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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 231

THE ALTON RAILROAD COMPANY, APPELLANT,

vs.

ILLINOIS COMMERCE COMMISSION, MOULDING-BROWNELL CORPORATION, AND E. HELDMAIER, INC., ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

FILED JULY 29, 1938.

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IN THE

SUPREME COURT OF ILLINOIS

FEBRUARY TERM, A. D. 1938

THE ALTON RAILROAD COMPANY, Appellant, vs. ILLINOIS COMMERCE COMMISSION, ex rel. MOULDING-BROWNELL CORPORATION, et al., Appellees.	Appeal from Circuit Court, Cook County. Honorable George W. Bristow, Trial Judge.

Abstract of Record.

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1 Placita.

3 Copy of notice of appeal to the Circuit Court of Cook County by The Alton Railroad Company from order made by the Illinois Commerce Commission on March 24, 1937, in its dockets 24391 and 22201; filed April 14, 1937, in the Circuit Court of Cook County, Number 37C-4220, and bearing acknowledgment of service upon the Secretary of Illinois Commerce Commission on April 13, 1937.

6 Copy of order made by Illinois Commerce Commission on March 24, 1937, in its dockets 24391 and

22201, filed in Circuit Court of Cook County on April 16, 1937. Order is as follows:

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

In the matter of the petition of The Alton Railroad Company for an order authorizing the abandonment and discontinuance of service by it over a switch track serving various industries in Chicago, Illinois.	24391	Consolidated
Moulding-Brownell Corporation *vs.* The Alton Railroad Company		
In the matter of application by complainant seeking maintenance of just, reasonable and non-discriminatory rates and transportation service on commodities moving from its plant in the Chicago switching district to various points in Illinois.	22201	

ORDER.

By the Commission:

These proceedings which are herein consolidated for the purpose of order both have to do with a controversy concerning the status of a certain spur

track in Chicago, and especially with reference to the question of who shall pay for the maintenance and repair of the said track and who shall pay certain fees or charges imposed by an ordinance of the City of Chicago as compensation to the City for the right to maintain the said track across certain streets and alleys in that city.

Case 22201 arose upon a complaint filed with the Commission on January 10, 1933, by Moulding-Brownell Corporation, one of the industries served over said spur track. Thereafter, on February 13, 1934, by leave of the Commission, an amended complaint was filed in case 22201 by Moulding-Brownell Corporation and E. Heldmaier, Inc., another one of the industries served over said spur track, praying that after due hearing and investigation by the Commission, an order be made commanding The
7 Alton Railroad Company (hereinafter called "the Alton") not to permit said track to be abandoned and its right to operate over it to be forfeited, and requiring the Alton to maintain and keep in force, for the future, transportation service for the movement of carload freight between the plants of the complainants and points in Illinois under such conditions and at such rates and charges as the Commission may deem just, reasonable and non-discriminatory, and on file with the Commission, and that such other and further order or orders be made as the Commission may deem proper in the premises.

Several hearings were had from time to time in Case 22201, and although the case was marked heard and taken on February 28, 1935, no findings of fact had been made and no order had been entered by

the Commission when a petition was filed by the Alton on March 11, 1936, in Case 24391 praying that an order be entered by the Commission determining that the industries located on and served by said track should pay all future costs of maintaining said track in so far as it is not located on the right of way of the Alton and is not owned by it, and all license and other fees assessed under ordinance or otherwise because of the occupancy of public streets and alleys by the said track; that in default of such payments by said industries the Alton be authorized to discontinue the rendering of service to said industries over said track; that in default of such payments by said industries, the Alton be further authorized to cancel the rates applicable on traffic to or from said industries and handled over said track by the Alton, upon short notice to be determined by the Commission, and that such other and further order or orders be made as may be proper.

At the time set for the hearing of Case 24391, and before any evidence had been offered, a motion was made by the Alton to consolidate the two cases, which motion was taken with the case, and for the
8 purposes of the hearing the two cases were treated as consolidated. Since the matters in controversy are the same in each case, the motion to consolidate the two cases should be allowed and the two cases disposed of by a single order.

After due hearings pursuant to notice as required by law and by the rules and regulations of the Commission at which the petitioner and each of the respondents in Case 24391 were represented, that case was marked heard and taken and subsequently

briefs were filed by the Alton, The Peoples Gas Light and Coke Company, (hereinafter called "the Gas Company"), the Moulding-Brownell Corporation and E. Heldmaier, Inc., also sometimes referred to in these proceedings as the Heldmaier Stone Company. A written statement was also filed by the Commonwealth Edison Company, named as a respondent in Case 24391, to the effect that no transportation service is rendered or is likely to be rendered to the Commonwealth Edison Company over the track in question, and claiming compensation for the use of its lands now occupied by said track.

On October 29, 1936, the Commission made and entered of record an order (1) consolidating, for the purpose of consideration and disposition by order, docket cases 22201 and 24391; (2) dismissing the petition in docket case 22201 filed by the Moulding-Brownell Corporation on January 10, 1933, and the petition or complaint of the Alton filed in docket case 24391 on March 11, 1936; (3) denying authority to abandon the track involved in this proceeding and in the said petitioners (petitions) and in said order more specifically described, and authority to discontinue the rendering of railroad service by means thereof; (4) ordering the Alton to continue the maintenance and operation of the aforesaid track and the rendering of railroad transportation service to the industries located adjacent thereto and to all of the public who may now or hereafter be reasonably entitled to such transportation service; and (5) retaining jurisdiction of the subject matter of this proceeding and of the parties hereto for the purpose of taking any further action with reference to the matters here involved as may at any time appear reasonable or necessary.

Thereafter, on December 9, 1936, the Commission, in conference, granted the petition of the Alton for rehearing of the consolidated Cases 22201 and 24391, and the Gas Company filed a reply to the petition for rehearing. Thereafter further hearings were had in the consolidated cases, at which evidence was offered by the Alton, after which oral arguments were heard by the Commission, and the cases were again taken for consideration and disposition by the Commission.

There is no controversy over the material facts in the two cases. The uncontradicted evidence in the case shows that the track in question was constructed by or at the cost and expense of owners of lands on which the track is laid, and that, except at its connection with the main track of the Alton and for a distance of 150 feet therefrom, it was constructed on lands not owned by the Alton or by any of its predecessors in interest. However, it crosses public streets and alleys in the City of Chicago and is, and has been for more than fifty years, connected with the main track of the railroad now owned by the Alton, and the Alton and its predecessors in interest have served industries over said spur track at least since 1904 and apparently since 1885.

The relief sought by the complainants in Case 22201 was based upon the alleged facts that certain plants of the Moulding-Brownell Corporation and E. Heldmaier, Inc., are served by the Alton over the spur track in question; that said track crosses certain public streets and alleys in the City of Chicago by authority of an ordinance of the City of Chicago which provides that if default be made in the payment of any of the installments of compensation, the

privileges thereby granted may be immediately revoked by the Mayor or the ordinance revoked by the City Council; that the Alton had, under date of November 4, 1932, notified the complainants and other shippers and receivers of freight that unless they would agree to reimburse the Alton for payments already made and to be made by it to the City of Chicago for the right to occupy said streets and highways with said spur track under said ordinance, the Alton would refuse to make further payments to the City of Chicago under the terms of said ordinance, thereby forfeiting its right to operate over said track and making it impossible for the complainants and other industries served by said track to ship and receive carload freight; that said track is also used to serve the plants of the Gas Company and Commonwealth Edison Company with carload freight; that the Moulding-Brownell Corporation has invested in its plant served by said track $350,000 and E. Heldmaier, Inc., has invested in its plant served by said track $50,000, and that the abandonment of said track by the Alton would necessitate the closing down of those plants, rendering the same of no use or value.

The petition filed by the Alton in Case 24391 alleges, in substance, that for many years the petitioner has been rendering rail service to various industries by operation over the spur track in question; that a portion of said track was originally constructed about 1866 or 1868, at grade, upon property belonging to others than petitioner, and crossing various public streets and alleys; that since then various extensions of said track have been constructed in accordance with contracts under which all or most of the cost of such extensions have

been paid and borne by one or another of the industries served by said track; that the industries now served by petitioner over said track are the
11 Commonwealth Edison Company, Heldmaier Stone Company, Moulding-Brownell Corporation and the Gas Company; that in 1900 an ordinance was passed by the City Council of the City of Chicago requiring The Chicago & Alton Railroad Company, the predecessor in interest of petitioner, to elevate its tracks within the City of Chicago; that in 1903 another ordinance was passed requiring it to elevate part of the spur track in question, and imposing a license fee of $300.00 per year for the privilege of maintaining said track across said streets and alleys; that thereafter said track was elevated in part, in accordance with the requirements of said 1903 ordinance; that on November 1, 1904, The Chicago & Alton Railroad Company and The Chicago & Alton Railway Company, another predecessor in interest of petitioner, in pursuance of a contract dated November 1, 1904, between the said Railway Company, the Gas Company and the Commonwealth Electric Company, the predecessor of Commonwealth Edison Company, assigned to the Electric Company and the Gas Company all their rights under said ordinance of 1903; that in said contract The Chicago & Alton Railway Company, its successors and assigns, acquired the right to operate over said track for the purpose of serving industries located thereon, agreeing to maintain, renew, replace and repair said track, and said industries agreed to and did pay the cost of elevating said track and also agreed to and did pay the license fee of $300 per year imposed by said ordinance of 1903; that said ordinance of 1903 expired in 1923; that thereafter a dispute arose

between The Chicago & Alton Railroad Company and its receivers then operating its properties, on the one hand, and the industries then served by said track, on the other hand, as to the basis upon which service should be given in the future over said track, the said Railroad Company and said receivers insisting that the cost of maintaining said spur track and all license fees charged by the City
12 of Chicago should be paid by the industries; that in 1924 another ordinance was passed by the City Council of the City of Chicago authorizing the said Railroad Company to continue to maintain and use said spur track across the public streets and alleys which it had theretofore crossed, but imposing a license fee of $1,400 per year for that privilege and requiring the posting of a bond for $10,000 conditioned upon the observance of all provisions of said ordinance; that negotiations looking to a settlement of said dispute had been unsuccessful, but that upon the passage of said ordinance the said Railroad Company filed an acceptance thereof upon a verbal understanding that the matters in dispute would be satisfactorily adjusted; that on May 9, 1934, another ordinance was passed by the City Council of the City of Chicago, reducing to $700 per year the license fee imposed by said ordinance of 1924; that since the passage of said ordinance of 1924, representatives of The Chicago & Alton Railroad Company and of the petitioner have had lengthy negotiations with representatives of the industries located on and served by said track in an effort to agree upon a basis of payment of the license fees imposed by said ordinances of 1924 and 1934, and the cost of maintaining and repairing said track, but all such efforts have been unsuccessful; that the petitioner

and its predecessors in interest have been compelled to and have paid to the City of Chicago the license fees imposed by said ordinances of 1924 and 1934 for all years up to November 1, 1936, have maintained said spur track and have kept on file the $10,000 bond required by said 1924 ordinance; that petitioner is the purchaser at judicial sale of all the railways and properties formerly owned and/or operated by The Chicago & Alton Railway Company, The Chicago & Alton Railroad Company, and the receivers of the properties of The Chicago & Alton Railroad Company, who were appointed as such receivers by the District Court of the United
13 States for the Northern District of Illinois, Eastern Division, and that since July 18, 1931, petitioner has been, and now is, in possession of and operating all of said properties; that under the decree of foreclosure and sale under which petitioner acquired said properties, petitioner was given the right to elect not to assume or adopt any contract made or assumed by The Chicago & Alton Railroad Company or any of its predecessors, which right of election expires on July 18, 1936; that pursuant to the right so given, or in accordance with the provisions of contracts now in effect, petitioner has cancelled or will cancel, and has elected or will elect not to assume, any of the contracts relating to said track, in which any obligation is imposed upon petitioner to pay for the maintenance and upkeep of said track, and that petitioner will also cancel the bond for $10,000 required by said ordinance to be posted with the City of Chicago; the result of which, as claimed by petitioner in its petition, will be that petitioner will be under no obligation to pay future maintenance or repair charges upon said track

which will soon render the track unsafe for operation and it will be physically impossible for petitioner to operate thereover, and there will be no authority to maintain and operate said track across public streets and alleys in the City of Chicago and petitioner will be unable to operate thereover; that petitioner does not own any of the real property upon which said track is constructed except that property within its regular right of way lines immediately adjacent to its main line, and that all of the real property upon which said track is constructed, except as hereinabove stated, is owned by one or more of the industries served by said spur track or lies within public streets and alleys in the City of Chicago; and that the uniform practice of petitioner in rendering service upon switch, spur or side tracks serving industries upon its lines, in all cases where such tracks extend beyond the right
14 of way of petitioner, is to require that all license fees and all maintenance, repair and other charges necessary to keep such tracks in good condition and safe for operation, be paid by the industry or industries served by such tracks.

In its petition the petitioner alleged, as matters of law from the facts alleged in the petition and hereinabove set forth, that there is no legal or other obligations upon it to continue to pay for the maintenance and repair of said spur track in such condition as will enable it to operate its engines thereon, and that there is no legal or other obligation upon it to pay to the City of Chicago or to any one else any license or other fees because of the occupancy of public streets and alleys by said track, and that if the industries now located upon and served by

said track desire the continuance of service thereon, it is their duty and obligation to maintain said track and pay whatever license or other fees are due and payable because of the occupancy of public streets and alleys thereby; and that any requirement that petitioner continue to pay the maintenance, license or other fees required to be paid in connection with the future operation and maintenance of said track will create a discrimination in favor of the industries served by said track and against other industries in Illinois served by petitioner over other and similar switch, spur or side tracks.

By its petition, The Alton Railroad Company offered to continue to furnish service to the industries now or hereafter located upon the track in question if said industries will undertake to maintain said track in so far as it is not located upon the property of the petitioner and is not now owned by it, in proper condition so that operation thereon will be safe, and will pay such license or other charges as must be paid in order to maintain said track in its present location.

None of the interested parties filed any answer
15 to the petition of the Alton or otherwise denied the allegations of fact contained in the petition, except that the Commonwealth Edison Company denied that any service is or has been furnished by the Alton to it over said track, and the evidence offered by the Alton at the hearing in Case 24391 sustained the allegations of fact contained in its petition, with the exception above noted. For the purpose of this order it will therefore be assumed that the facts in the consolidated cases are as alleged in the petition of the Alton in Case 24391, with the excep-

tion above noted. Additional facts established by the evidence offered by the Alton at the hearing of Case 24391 are that the main line of the Alton, at and near its connection with the spur track in question, runs approximately east and west; that the track in question branches off the main line at Stark Street in Chicago, swings around to the north across Mary and Hillock Streets and then extends in a northwesterly and westerly direction north of and parallel to Cologne Street into premises owned by the Gas Company, west of Loomis Street, on which is located a gas manufacturing plant of the Gas Company; that the length of the spur track from its connection with the main line of the Alton to the west side of Loomis Street is 2831 feet, which is the only part of the track concerning which there is any controversy over the question of maintenance and repair, as that portion of the track located on the premises of the Gas Company lying west of Loomis Street has always been maintained at the expense of the Gas Company; that five industrial spur tracks branch off the track in question to plants of the Moulding-Brownell Corporation and of E. Heldmaier, Inc., and to another plant of the Gas Company lying east of Loomis Street; that since November 1, 1904, the Alton and its predecessors in interest have borne all cost of maintaining the spur track from its connection with the main line
16 to the west side of Loomis Street pursuant to the terms of the contract dated November 1, 1904, referred to in the Alton's petition, between one of the predecessors of the Alton, the Gas Company and the Commonwealth Electric Company, which contract was terminated on March 26, 1936, by the Alton filing in the District Court of the United States at

Chicago its election not to assume the contract; that the respective industries have always borne the cost of maintaining the industrial spur tracks which branch off the track in question and serve the respective plants of said industries; that the Gas Company and the Commonwealth Electric Company paid the whole cost of elevating the track in question in 1904, amounting to $37,000; that at least since 1928 the Alton and its predecessors have been paying taxes on said track, but the Alton has now ceased such tax payments because it does not own the track; that the Alton has not been able to ascertain when the track in question was constructed, but the earliest maps in its files show that it was constructed at least as far back as July, 1884, and those maps show that the track was then privately owned, but the Alton has no knowledge as to who actually constructed the track in the first instance.

After the rehearing had been granted, the Alton offered further evidence showing that it had not paid the $700 license fee to the City of Chicago, due November 1, 1936, and that the bond required by the ordinance to be posted with the City has been cancelled; also showing that the track in question is in bad condition and is in need of relaying of the rails; that it is laid with 80-pound rails, but as the Alton does not carry 80-pound rails in stock, if the Alton is required to relay the track, it will be relaid with 90-pound rails; that the reason for the use of the heavier weight of rails by the railroads is to eliminate danger and maintenance costs; that the trestle supporting the elevated portion of the track
17 is in need of rebuilding; that it is built of untreated timber, and the present practice of the Alton is to

rebuild with creosoted timber; that a portion of the track requires additional ballast, and the plank flooring which carries the ballast on the steel span across Hillock Street is decayed and needs immediate attention; and that the planking is now untreated timber and would be replaced with creosoted timber. The witness testifying to those facts stated that, under the rules and regulations of the Interstate Commerce Commission, if the track belonged to the Alton the additional cost of 90-pound rails over 80-pound rails and the additional cost of the creosoted timber over untreated timber and the cost of the ballast would all be chargeable to the capital account and would thereby be added to the value of the Alton's property upon which the Alton is entitled to a fair return.

The evidence further shows that the Alton has other spur tracks in Illinois of the same length of the track in question, with spurs leading off therefrom and serving industries, but the lead track in each instance is on property of The Alton Railroad Company and the Railroad Company owns those lead tracks.

From the foregoing it is apparent that the real controversy between the Alton, on the one hand, and the industries, on the other hand, is whether the Alton is obligated to maintain and keep in repair the track in question and pay to the City of Chicago whatever amounts, if any, must be paid as compensation for the crossing of streets and alleys by said track. The Alton does not contend that public convenience and necessity no longer require the operation of the track, nor does it contend that the operation over the track has resulted or will

result in any loss to it. On the contrary, the evidence shows that the track is indispensable to the operation of the plants of the Gas Company and the plants of the Moulding-Brownell Corporation and E. Heldmaier, Inc., and that the traffic handled
18 over the track in 1934 by the Alton amounted to about $40,000 according to the testimony of the Alton's own witness.

Under the law of this State, as established by numerous decisions of the Supreme Court, a railroad switch track, side track or spur track constructed in whole or in part on or across public streets or highways and connected with the main line of a railroad becomes a part of that railroad, and therefore a public highway in the sense that term is used in the Constitution of this State, whether constructed by the company owning or operating such main line of railroad or by the owner of an industry served by such switch track, side track or spur track or at the joint expense of the railroad company and such owner, and the railroad company is subjected to the same duty to use such switch track, side track or spur track for the convenience and benefit of the public as any part of its main track. Such being the established law of this State, in the opinion of the Commission, it necessarily and inevitably follows that the company owning or operating the main line of railroad with which such switch track, side track or spur track is connected is obligated to maintain and keep in repair the switch track, side track or spur track, and that obligation is in no way affected by the fact that the railroad company, in maintaining and repairing the track, may choose to replace the existing rails, timbers

or other materials with more expensive rails, timbers or materials, whereby, if it owned the track, it would be entitled, under the rules and regulations of the Interstate Commerce Commission, to charge the additional cost to its capital account.

The track in question crosses several streets and alleys and is, and has been for more than thirty years, connected with the main track of the rail-
19 road now owned by the Alton. It is therefore a part of the railroad now owned by the Alton and is a public highway open to public use. Its use is not limited to the industries which are now served by the industrial spur tracks which branch off therefrom, but any member of the public who can be served thereby is entitled to such service. It would therefore seem most inequitable and unjust to require the industries served by the existing industrial spur tracks to pay the cost of maintaining and keeping in repair the track in question or to pay any license fees exacted by the City of Chicago on account of the track in question crossing public streets and highways.

The track in question is not the ordinary switch track or spur track constructed or maintained by the Alton or its predecessors under the form of agreement offered in evidence by the Alton and referred to by its principal witness as the standard form of switch agreement. That form of agreement requires the industry to maintain the track. The witness, however, testified that he knew of no case where the Alton had occasion to build a track under an agreement to serve two industries. The same witness testified that the Alton has other spur tracks in Illinois of the same length and with indus-

trial spur tracks leading off therefrom and serving more than one industry, and he specifically mentioned five such tracks located in the State of Illinois, but it developed upon cross-examination that all of those spur tracks are on property of the Alton and that the Alton owns and maintains those tracks. The witness referred to those tracks as switching leads to the industries served over those tracks. The same witness referred to the track in question as "the main lead" and it is referred to in one of the records produced by the Alton from its files as the "Cologne St. main track." It seems apparent that the track in question is comparable, so far as its use and purpose is concerned, to the five switching leads referred to by the Alton's witness and which are maintained by the Alton. The contention of the Alton that the continued maintenance by it of the track in question will cause an unlawful discrimination is, in the opinion of the Commission, wholly without merit.

The prayers with reference to changing existing rates and charges for transportation of freight to and from the industries served over the track in question are so interwoven with and dependent upon the prayers for the other relief sought, that a disposition of the principal question of the obligation of the Alton to maintain the track in question and continue to furnish service to the industries also disposes of any question concerning any change in existing rates and charges. Moreover no evidence was offered by any of the parties as to the reasonableness or unreasonableness of existing rates and charges for transportation of freight to and from the industries served over the track in question, and

therefore no findings can be made or order entered affecting such rates and charges.

As hereinabove stated, the track in question was in existence long prior to 1903 and crossed Stark Street, Mary Street and Hillock Street, as well as Throop Street and Loomis Street at grade. The evidence does not show whether or not any compensation was exacted by the City of Chicago for maintaining the track across those streets prior to November 2, 1903. However, on November 2, 1903, the City Council of the City of Chicago passed an ordinance requiring The Chicago & Alton Railroad Company to elevate that portion of the track extending from its connection with the main track of the Railroad Company on a descending grade to
21 a point terminating east of Throop Street, crossing Stark Street, Mary Street and Hillock Street upon suitable bridges, and imposed a charge of $300 per annum for the privileges granted by the ordinance for a period of twenty years. The so-called privileges granted by the ordinance of November 2, 1903, therefore expired on November 2, 1923. Thereafter on December 10, 1924, the City Council of the City of Chicago passed another ordinance purporting to grant permission and authority to The Chicago & Alton Railroad Company to maintain and use, as then constructed, the track in question over and across Stark Street, Mary Street, Hillock Street, Throop Street and Loomis Street, and across two public alleys, for a period of twenty years from and after November 2, 1923, unless said ordinance should be sooner modified, amended or repealed in accordance with the right reserved by the City to modify, amend or repeal the ordinance. The amount

required to be paid to the City as compensation for the privileges granted by the ordinance was fixed by the ordinance at $1,400 per annum, payable annually in advance, and the ordinance provides that if default shall be made in the payment of any of the installments of compensation therein provided for, the privileges therein granted may be immediately revoked by the Mayor or the ordinance may be repealed by the City Council. The ordinance also required the Railroad Company to execute a bond to the City of Chicago in the penal sum of $10,000, with sureties, conditioned upon the faithful observance and performance of the conditions and provisions of the ordinance and to indemnify the City against liabilities incurred by the City by reason of the authority thereby granted. By an ordinance passed May 9, 1934, the compensation thereafter to be paid to the City under the ordinance of December 10, 1924, was reduced to $700 per annum.

Before the fiiing of the complaint in Case 22201, the Alton served notice on the industries located
22 on and served by the track in question that unless they would agree to reimburse the Alton for payments already made and to be made by it to the City of Chicago for the right to occupy said streets and alleys with said track, the Alton would refuse to make further payments to the City of Chicago under the terms of said ordinance, which notice apparently precipitated the filing of that complaint, and since the entry of the order herein on October 29, 1936, the Alton has failed to make the annual payment to the City of Chicago which, under the terms of the ordinance, was payable November 2, 1936, and has cancelled the bond for $10,000 which it had therefore posted with the City.

Neither the evidence nor the arguments of the parties present the question of the right of the City of Chicago to impose the charge fixed by the ordinance of December 10, 1924, or the charge fixed by the ordinance of May 9, 1934, for maintaining the track across streets and alleys in that city. The charge was not prescribed by either ordinance as a condition to the granting of permission to extend the track across or above city streets, but was imposed as a charge for maintaining across or above city streets a track which was, and had been for many years, in existence and use by the Alton and its predecessors in interest. Whether or not the City of Chicago can enforce the payment of the charge prescribed by the ordinance is a legal question which may properly be left to the determination of the courts. Manifestly the City is without power to interrupt state and interstate commerce by physical interference with railroad operation over these long established crossings, and therefore the failure of the Alton to pay the annual amount imposed by the ordinance or to post with the City the bond mentioned in the ordinance cannot affect the authority and jurisdiction of the Commission to require the Alton to continue the maintenance and operation of the track in question and the rendering
23 of railroad transportation service over said track. If an action be brought by the City of Chicago in the courts to recover the annual amount imposed by the ordinance for the so-called privilege of maintaining the track across public streets and alleys, it will then be the function of the court to determine whether the Alton is in any way obligated to make such payment. The Commission, however, will retain jurisdiction for the purpose of taking further

action upon this point if that should prove to be necessary.

As hereinabove stated, the Commonwealth Edison Company, by a statement filed by it, claimed that, if the track is to be maintained, that company should receive reasonable compensation for the use of its property occupied by the track. The statement was not in the form of a petition, nor did it contain any prayer, that the Commission determine or award such compensation, nor was any evidence offered to show what compensation would be reasonable, and there is therefore nothing in these proceedings which requires the Commission to give any consideration to the question whether the Commonwealth Edison Company should receive compensation for the use of its property occupied by the track.

For the reasons above stated it is manifest that the prayer of the petition filed by the Alton that an order be entered by the Commission determining that the industries located on and served by the track in question should pay all future costs of maintaining said track in so far as it is not located on the right of way of the Alton and is not owned by it, and all license and other fees assessed under ordinance or otherwise because of the occupancy of public streets and alleys by the said track, cannot be granted, and it necessarily follows that the remainder of the prayer of the petition must be denied, and that the Commission will not, upon the grounds relied upon by the Alton in its petition in Case
24 24391, authorize the abandonment or discontinuance of said track or the interruption of transportation service thereon or the cancellation of the rates now on file with the Commission applicable on traf-

fic to or from said industries and handled over said track by the Alton.

It follows that the prayer of the application filed by Moulding-Brownell Corporation in Case 22201 that an order be made commanding the Alton not to permit said track to be abandoned, and requiring the Alton to maintain and keep in force transportation service for the movements of carload freight between the plant of Moulding-Brownell Corporation and points in Illinois, should be granted.

Inasmuch as additional evidence was offered by the Alton after its petition for rehearing was granted and the Commission has reconsidered all the evidence offered in both of the consolidated cases, and has heard additional argument by counsel for the respective parties, the Commission considers it advisable to rescind the order made and entered of record in the consolidated cases on October 28, 1936, and to make and enter a new order, although the general effect of the new order is the same as the order heretofore made and entered of record on October 28, 1936.

From a consideration of the complaint and amended complaint in docket case 22201 and of the petition in docket case 24391 and of the briefs and arguments of the respective parties, the Commission finds:

1. that the subject matter in both of said cases is a certain railroad spur track branching off the main track of The Alton Railroad Company at Stark Street, in Chicago, and swinging around to the north across Mary Street and Hillock Street, and then extending in a northwesterly and

westerly direction north of and parallel with Cologne Street, and across Throop Street and Loomis Street, into premises owned by The Peoples Gas Light and Coke Company, west of Loomis Street, on which premises is located a gas manufacturing plant of the Gas Company;

2. that the principal issues in each of said cases are whether The Alton Railroad Company is obligated to maintain and operate said spur track and to pay the fees and charges imposed by an ordinance of the City of Chicago as compensation for the right or privilege to maintain said track across said streets and certain alleys in that city; but that it is unnecessary for the Commission to decide the issue whether The Alton Railroad Company is obligated to pay the fees and charges imposed by said ordinance for the reasons hereinabove stated; and

3. that by reason of the foregoing and all matters of record, the Commission has jurisdiction of the subject matter of these proceedings and of the parties thereto.

And the Commission having considered all the evidence, both oral and documentary, finds therefrom:

(1) that The Alton Railroad Company (hereinafter referred to as "the Alton"), petitioner in Case 24391 and respondent in Case 22201, is a corporation engaged in the operation of a line of railroad as a common carrier in the State of Illinois and is the successor in interest to The Chicago & Alton Railroad Company and its receivers, and to The Chicago & Alton Railway Company;

(2) that the Alton and its said predecessors in interest, at least since 1904 and apparently since 1885, have furnished railroad transportation service over a certain spur track in the City of Chicago, in the State of Illinois, to industries adjacent to said track and in the vicinity thereof, which spur track now is, and during all of said period of time has been, connected with the main track of the railroad now owned by the Alton and crosses certain streets and alleys in said City, which streets are hereinafter referred to by name;

(3) that said spur track was constructed by or at the cost and expense of owners of lands on which the track is laid, and not at the cost or expense of the Alton or any of its predecessors in interest, and that, except at its connection with the main track of the railroad now owned by the Alton and for a distance of 150 feet therefrom, said spur track was constructed, and is now located, on lands not owned by the Alton;

(4) that said spur track, as originally constructed crossed Stark Street, Mary Street, Hillock Street, Throop Street (formerly Main Street) and Loomis Street (formerly Deering Street) at grade, but on November 2, 1903, the City Council of the City of Chicago passed an ordinance requiring The Chicago & Alton Railroad Company, one of the predecessors in in-
26 terest of the Alton, to elevate that portion of said spur track extending from its connection with the main track of said railroad company, on a descending grade, to a point on said spur track east of Throop Street, and requiring said spur track to cross Stark Street, Mary Street and

Hillock Street upon bridges to be built and installed by said railroad company, and said ordinance imposed a charge of $300 per annum, for a period of twenty years, for the privilege of maintaining said spur track across said street;

(5) that under date of November 1, 1904, The Chicago & Alton Railway Company and The Peoples Gas Light and Coke Company (herein sometimes referred to as "the Gas Company"), one of the industries served over said spur track, and the Commonwealth Electric Company, a predecessor of the Commonwealth Edison Company, one of the owners of lands on which said spur track was then laid, entered into an agreement by which the Gas Company and said Commonwealth Electric Company agreed to pay the entire cost of elevating said spur track in accordance with the requirements of said ordinance, and agreed that for and during the period of five years from and after January 1, 1905, and thereafter until terminated by one year's notice by any of the parties to said agreement, said railway company, to the exclusion of all other railroad companies, should be permitted to use and operate said spur track for the purpose of handling freight business of the Gas Company and of said Commonwealth Electric Company and of such other industries as may be located upon any lot or lots abutting upon said track; that said agreement further provided that during said period of five years, and so long thereafter as said railway company should be permitted to use and operate said spur track as aforesaid to the exclusion of all other railroad companies, said rail-

way company should maintain, renew, replace and repair said track and should bear and defray all expenses, costs and liabilities arising from the use and operation of the cars and engines over the same by said railway company, and that the Gas Company and said Commonwealth Electric Company should carry out and perform all the obligations of The Chicago & Alton Railroad Company and of said railway company under said ordinance including the obligation to make the annual payment to said City as required by said ordinance;

(6) that said spur track was elevated in accordance with the requirements of said ordinance, and the Gas company and/or said Commonwealth Electric Company paid the entire cost of such elevation, and, during the period said ordinance remained in effect, the predecessors of the Alton did, to the exclusion of all other railroad companies, use and operate said spur track for the purpose of handling freight business of the Gas
27 Company and of such other industries as were located upon lots abutting upon said track as desired railroad transportation service over said track, and did, during said period, maintain, renew, replace and repair said track, and the Gas Company, during said period, did reimburse the Alton for all annual payments made by the Alton to the City of Chicago required by said ordinance;

(7) that said ordinance of November 2, 1903, expired on November 2, 1923, and thereafter, on December 10, 1924, another ordinance was passed by the City Council of the City of Chicago purporting to grant permission and authority to said The

Chicago & Alton Railroad Company to maintain and use, as then constructed, said spur track over and across Stark Street, Mary Street, Hillock Street, Throop Street and Loomis Street and two public alleys in the City of Chicago for a period of twenty years from and after November 2, 1923, unless said ordinance should be sooner modified, amended or repealed in accordance with the right reserved by said City to modify, amend or repeal said ordinance, and fixing the amount to be paid to the City of Chicago as compensation for the privilege of maintaining said track across said streets and alleys at $1400 per annum, payable in advance, and providing that if default should be made in the payment of any of the installments of compensation therein provided for, the privileges therein granted may be immediately revoked by the Mayor of said City or the ordinance repealed by the City Council, and that said ordinance also required said railroad company to post with the City of Chicago a bond in the penal sum of $10,000, with sureties, conditioned upon the faithful observance and performance of the conditions and provisions of said ordinance and to indemnify the City against liabilities incurred by reason of the authority granted by said ordinance, which bond was posted with the City by said railroad company;

(8) that by ordinance passed May 9, 1934, the compensation thereafter to be paid to the City under said ordinance of December 10, 1924, was reduced to $700 per annum;

(9) that since the passage of the said ordinance of December 10, 1924, the Alton and its predeces-

sors in interest have continued to furnish railroad transportation service to the industries located adjacent to or capable of being served over said spur track, and have maintained said track, at their own expense, and up to November 2, 1936, paid all compensation required to be paid to said City by said ordinance and have not been reimbursed therefor except in the amount of $900 which was paid by the Gas Company to predecessors of the Alton, on account of the compensation paid to the City under said ordinance for the period from November 2, 1923, to November 2, 1925;

28 (10) that the Alton failed to make the payment due November 2, 1936, under the terms of said ordinance of December 10, 1924, as amended by said ordinance of May 9, 1934, and has cancelled the bond required by said ordinance of December 10, 1924, to be posted with the City of Chicago;

(11) that the Alton was the purchaser at judicial sale of all the railways and properties formerly owned and/or operated by The Chicago & Alton Railway Company, The Chicago & Alton Railroad Company, and the receivers of the properties of The Chicago & Alton Railroad Company who were appointed as such receivers by the District Court of the United States for the Northern District of Illinois, Eastern Division, and that since July 18, 1931, the Alton has been, and now is, in possession of and operating all of said properties; that under the decree of foreclosure and sale under which the Alton acquired said properties, the Alton was given the right to elect not to assume or adopt any contract made or assumed by The Chicago & Alton Railroad Company or any of its predecessors, and

that on March 26, 1936, the Alton filed in said District Court its election not to assume said contract dated November 1, 1904, between The Chicago & Alton Railway Company, the Gas Company and the Commonwealth Electric Company;

(12) that the industries now, and ever since the filing of the complaint in case 22201, served over said spur track are the Moulding-Brownell Corporation and E. Heldmaier, Inc., the complainants in Case 22201, and the Gas Company; that each of said industries is furnished railroad transportation service by means of industrial spur tracks, paid for by the respective industries, which branch off the spur track in question, except that a gas manufacturing plant of the Gas Company is furnished railroad transportation service by means of an extension of said spur track west of Throop Street, and no controversy exists in this case with reference to the maintenance, repair and renewal of the industrial spur tracks branching off from said spur track or of the extension of said spur track west of Throop Street into said gas manufacturing plant of the Gas Company, as the cost and expense of maintenance, repair and renewal of such industrial spur tracks and of said extension have always been borne by the industries served thereby;

(13) that the Gas Company, the Moulding-Brownell Corporation and E. Heldmaier, Inc., at their respective premises here under consideration, have no other means of railroad transportation service available, nor have they any railroad connection except by means of the spur track here under consideration;

(14) that the said spur track extends across property owned by the Commonwealth Edison Company, but said company is not, and has never been, furnished with railroad transportation service over said track;

29 (15) that the length of said spur track from its connection with the main line of the Alton to the west side of Loomis Street is 2831 feet;

(16) that said spur track is in bad condition and is in need of relaying of the rails; that it is laid with 80-pound rails, but the Alton does not carry 80-pound rails in stock and now uses 90-pound rails in relaying such tracks to eliminate danger and maintenance costs; that if the Alton owned the track, the cost of 80 pounds of the new rail would, under the rules of the Interstate Commerce Commission, be charged to maintenance and the additional 10 pounds to additions and betterments, meaning to capital account; that the trestle supporting the elevated portion of the track is in need of rebuilding; that it is built of untreated timber and the present practice of the Alton is to rebuild with creosoted timber, and that the cost of creosoted timber over untreated timber, if applied to a structure owned by the Alton, would be betterment and, under the rules of the Interstate Commerce Commission, chargeable to capital account; that a portion of the track requires additional ballast, the cost of which, if applied to a track owned by the Alton, would, under the rules of the Interstate Commerce Commission, be chargeable to capital account; that the plank flooring which carries the ballast on the steel span across Hillock Street is decayed and needs im-

mediate attention; that the planking is now untreated timber, and if replaced with creosoted timber, would involve a betterment and, under the rules of the Interstate Commerce Commission, would be chargeable to capital account if the structure belonged to the Alton;

(17) that the Alton has other spur tracks (known as lead tracks) in Illinois of the same length of the spur track here in question, with spurs leading off therefrom and serving industries, but the lead track in each instance, which serves the same purpose as the spur track here in question, is on property of the Alton and the Alton owns and maintains those lead tracks;

(18) that cases bearing Illinois Commerce Commission docket numbers 22201 and 24391 should be consolidated for the purpose of consideration and disposition by order;

(19) that by reason of the matters hereinbefore set forth the said spur track in question is a public track and part of the railroad facilities of The Alton Railroad Company;

(20) that authority to abandon the said spur track involved in this consolidated proceeding and in the said complaint and petition and in this order more specifically described, and for authority to discontinue the rendering of railroad transportation service by means thereof should be specifically denied;

(21) that The Alton Railroad Company should be specifically ordered and directed to continue the maintenance and operation of the aforesaid spur track and the rendering of railroad transportation service by means thereof to the industries now

served thereby and to such other industries and to all of the public who may now or hereafter be reasonably entitled to such transportation service over said track;

(22) that public convenience and necessity requires that the Alton continue the maintenance and operation of said spur track;

(23) that the order made and entered of record herein on October 28, 1936, should be rescinded; and

(24) that the Commission should retain jurisdiction of the subject matter of this consolidated proceeding and of the parties hereto for the purpose of taking any further action with reference to the matters here involved as may at any time appear reasonable or necessary.

It Is Therefore Ordered that docket cases 22201 and 24391 be, and they are, consolidated for the purpose of consideration and disposition by order.

It Is Further Ordered that authority to abandon the spur track involved in this proceeding and in the said complaint and petition and in this order more specifically described, and for authority to discontinue the rendering of railroad transportation service by means thereof, be, and it is hereby, specifically denied.

It Is Further Ordered that The Alton Railroad Company be, and it hereby is, specifically ordered to continue the maintenance and operation of the aforesaid spur track and the rendering of railroad transportation service by means thereof to the industries now served thereby and to such other industries and

to all of the public who may now or hereafter be reasonably entitled to such transportation service over said track.

IT IS FURTHER ORDERED that the order made and entered of record herein on October 28, 1936, be, and the same hereby is, rescinded.

31 IT IS FURTHER ORDERED that the Commission retain jurisdiction of the subject matter of this proceeding and of the parties hereto for the purpose of taking any further action with reference to the matters here involved as may at any time appear reasonable or necessary.

By order of the Commission at Chicago, Illinois, this 24th day of March, 1937.

(Signed) William W. Hart,
Secretary.

(Seal)

32 STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

CERTIFICATE

Re: 24391-22201—Consolidated

I, William W. Hart, do hereby certify that I am Secretary of the Illinois Commerce Commission of the State of Illinois and keeper of the records of said Commission.

I further certify that the above and foregoing is a true, correct and complete copy of order made and entered of record by said Commission on the 24th day of March, A. D. 1937.

Given under my hand and the seal of said Illinois Commerce Commission at Springfield, Illinois, this 31st day of March, A. D. 1937.

William W. Hart,
Secretary.

(Seal)

34 Appearance of C. B. Cardy and W. S. Garman, as attorneys for Moulding-Brownell Corporation, et al, filed April 27, 1937.

36 Appearance of Otto Kerner, Attorney General, and Harry R. Booth and W. Robert Ming, Jr., Assistant Attorneys General, as attorneys for Illinois Commerce Commission, filed April 28, 1937.

38 Record of proceedings before Illinois Commerce Commission filed May 3, 1937.

RECORD BEFORE ILLINOIS COMMERCE COMMISSION

41 Complaint of Moulding-Brownell Corporation and E. Heldmaier, Inc., against The Alton Railroad Company, City of Chicago, Peoples Gas Light and Coke Company and Commonwealth Edison Company, filed with Illinois Commerce Commission in its docket 22201 on December 14, 1933.

52 Copy of complaint served on The Alton Railroad Company; case set for hearing March 2, 1933, and continued until March 30, 1933.

53 Stipulation to continue hearing of case from March 2, 1933, until March 30, 1933.

55 Stipulation to continue hearing of case from March 30, 1933, until May 2, 1933.

56 Hearing of case continued from March 30, 1933, until May 11, 1933.

57 Stipulation that hearing of case may be continued from May 11, 1933, until June 15, 1933.

58 Hearing of case continued from May 11, 1933, to June 15, 1933, and from June 15, 1933, to September 14, 1933.

59 Stipulation to continue hearing of case from June 15, 1933, to September 15, 1933.

61 Stipulation to continue hearing of case from September 14, 1933, to October 24, 1933.

62 Hearing of case continued from September 15, 1933, to October 24, 1933, and from October 24, 1933, to November 22, 1933.

63 Stipulation to continue hearing of case from October 24, 1933, to November 22, 1933.

65 Stipulation to continue hearing of case from November 22, 1933, to November 28, 1933.

66 Hearing of case continued from November 22, 1933, to November 28, 1933, and from November 28, 1933, to January 9, 1934, with leave to complainants to file amended complaint.

74 Copy of amended complaint by Moulding-Brownell Corporation and E. Heldmaier, Inc., against The Alton Railroad Company, City of Chicago, Peoples Gas Light & Coke Co. and Commonwealth Edison Co. filed December 14, 1933. Complaint alleges that
75 Moulding-Brownell Corporation is an Illinois corporation engaged in the production, sale and distribution of sand, graved, crushed stone, cement, coal and other commodities; that E. Heldmaier, Inc., is

an Illinois corporation, engaged in business as a retail cut-stone contractor; that both complainants ship and receive shipments of freight over the lines of The Alton Railroad Company, which is a common carrier for hire and subject to the provisions of the
76 Illinois Public Utilities Act; that the City of Chicago is a municipal corporation, and the Peoples Gas Light & Coke Company and the Commonwealth Edison Company are public service corporations, doing business in Chicago and operating plants therein and shipping and receiving freight over the lines of The Alton Railroad Company; that complainants operate plants in Chicago upon spur tracks extending from the main line of the railroad to the plants of the complainants, which spur tracks are owned, in whole or in part, by the Gas Company and the Edison Company, and are used and operated by the Railroad Company under leases or operating agree-
77 ments; that said tracks are laid across public streets under an ordinance of the City of Chicago which provides that if default be made in the payment of the compensation required by the ordinance, the privileges granted thereby may be revoked; that The Alton Railroad Company notified complainants on November 4, 1932, that unless it was reimbursed for payments made and to be made by it to the City of Chicago, it would refuse to make any such further payments, thereby forfeiting its right to operate over said tracks and making it impossible for complainants to ship and receive freight thereon, all contrary to the provisions of the Public Utilities Act; that the ordinance of the City of Chicago and the compensation reserved therein are unreasonable and excessive and contrary to law; that the Railroad Company lists
78 complainants as industries on its line in tariffs filed

by it; that in 1931 the Moulding-Brownell Corporation shipped and received 170 cars of freight over the lines of the Railroad Company and said spur tracks, and 1074 such cars in 1932; that the estimated revenue of the Alton on said shipments was $2,360 in 1931 and $18,540 in 1932; that said spur tracks are also used to serve the plants of the Gas Company and the Edison Company; that the investment of the Moulding-Brownell Company in its plant is $350,000 and that of E. Heldmaier, Inc., in its plant is $50,000,
79 and that the abandonment of service by the Railroad Company over said spur tracks would cause petitioners to lose their investment in these plants; that the threatened abandonment of rights by the Railroad Company is contrary to law, and that under the law, it is its duty to maintain said tracks and receive and deliver freight thereon; that jurisdiction of the
80 Illinois Commerce Commission over the matter is established by sections 8, 32, 51 and 58 of the Illinois Public Utilities Act; that the Commission should, after hearing, make an order commanding the Railroad Company not to permit said tracks to be abandoned and requiring the Railroad Company to continue transportation service thereon, between the plants of complainants and points in Illinois.

85 Hearing of case continued from January 9, 1934, to February 13, 1934.

89 Hearing of case continued from February 13, 1934, to March 13, 1934; and from March 13, 1934, to April 12, 1934.

90 Stipulation to continue hearing of case from March 13, 1934, to April 13, 1934.

92 Stipulation to continue hearing of case from April 12, 1934, to May 15, 1934.

93 Hearing of case continued from May 15, 1934, to June 13, 1934.

94 Stipulation to continue hearing of case from May 13, 1934, to June 13, 1934.

95 Hearing of case continued from June 13, 1934, to June 27, 1934, and from June 27, 1934, to July 11, 1934.

100 Hearing of case continued from July 11, 1934, to July 24, 1934.

106 Hearing of case continued from July 24, 1934, to September 25, 1934.

109 Hearing of case continued from September 25, 1934, to October 10, 1934.

112 Hearing of case continued from October 10, 1934, to November 15, 1934, and from November 15, 1934, to November 27, 1934.

115 Hearing of case continued from November 27, 1934, to December 13, 1934; from December 13, 1934, to January 16, 1935; from January 16, 1935, to January 30, 1935; and from January 30, 1935, to February 13, 1935.

119 Case called for hearing on February 27, 1935, and continued to February 28, 1935. Case heard on February 28, 1935.

120 Report of proceedings had February 28, 1935, on the hearing before the Illinois Commerce Commission in its Docket 22201, "Moulding-Brownell Company *et al, vs.* Alton Railroad Company, *et al.*"

Appearances, J. L. Hodgson and C. B. Cardy, for Complainant; Bryce L. Hamilton, for Respondent.

128 J. L. HODGSON, a witness for Moulding-Brownell Company, was sworn and testified as follows:

Direct Examination.

My name is J. L. Hodgson and I am Traffic Manager of the Moulding-Brownell Corporation. That Company handles building material and the production and sales distribution of sand, gravel, crushed stone, cement and other building materials, also coal. It has a material yard and dock facilities at what we call 26th and Illinois Streets on the south side of the Chicago River between Loomis and Throop
129 Streets. That plant has been operated by the Moulding-Brownell Company since 1930, and prior to then had been operated by the American Sand & Gravel Company since 1924. The American Sand & Gravel Company was one of several companies that merged into the Moulding-Brownell Corporation. I was
130 with the American Sand & Gravel Company for 23 years. Its investment in this yard was approximately $350,000. Sand, gravel, lime, plaster and coal is shipped in and out of the yard at the rate of from 5 to 15 cars a day. It is practically all inbound interstate and state traffic. Complainant's Exhibit 1
131 shows the number of shipments received at that yard during the years 1933 and 1934 upon which the Alton Railroad Company received revenue. (Document marked Complainant's Exhibit 1). The yard is located exclusively on the Alton Railroad. Page 4 of
132 the original complaint correctly shows the number of inbound shipments for 1931 and 1932. There has been an increase in the movement at that plant in the last few years. The estimated Alton revenue shown

on Exhibit 1 is mostly derived from switching business, but there is some road-haul business. I esti-
133 mated the amount from what I thought the division of rates would be. Complainant's Exhibit 2 is a map showing the location of this plant with reference to the tracks of the Railroad Company. (Document marked Complainant's Ex. 2). Complainant's Exhibit 3 shows the location of the tracks adjacent to the plant in more detail.

134 (Document marked Complainant's Ex. 3). On this exhibit the plant is shown half way between Loomis and Throop Streets, opposite the figures "No. 166", and is the 2 lots above the figures "No. 166." The plant is adjacent to and directly north of the spur track. Prior to the location of the plant
135 at that point I had negotiations with the Railroad Company with reference to the construction of the switch track. Complainant's Exhibit 4 is a copy of a switch track agreement made on April 5, 1924, between the American Sand & Gravel Company and the Chicago & Alton Railroad Company. (Docu-
136 ment marked Complainant's Ex. 4). I was in the employ of the American Sand & Gravel Company when this contract was made, and after it was made the Chicago & Alton Railroad Company constructed a spur track leading to the track in accordance with the agreement. The track was constructed immedi-
138 ately north of the spur track, into the plant. I do not know the length of the truck constructed, but it was long enough to receive carload shipments in and
141 out. The track designated as being in green and that designated as being in red in the contract appears from the language of the contract. I know this of my personal knowledge.

141a The track referred to as being shown in green
142 was the property of the Gravel Company and was constructed under the contract. It leads into the plant. The track referred to as shown in red is the
143 track with which the green track connects. I know
144 that of my own knowledge. I presume that the consideration mentioned in the contract was paid to the Chicago & Alton Railroad Company or its Receivers, as we had the track constructed and have been
145 operating it. I was then the Traffic Manager of the American Sand & Gravel Company, and am still handling the business of the Moulding-Brownell
146 Company. The track shown in red on this agreement is the continuous track extending beyond the plant both east and west. It is immediately above the "166" shown on the exhibit and is inside of the sidewalk. On May 9, 1934, the City Council of Chi-
147 cago passed an ordinance amending an ordinance passed on December 10, 1924, and reducing the charge to the Chicago & Alton Railroad Company
148 for maintaining switch tracks across certain streets and alleys from $1400 a year to $700 a year, and providing that the reduced payment was to be made for each year beginning November 2, 1932. The track
149 constructed under Exhibit 4 does not cross any streets or alleys and no industries besides the American Sand & Gravel Company are located upon it. The Heldmaier Stone Company, the other complainant, is located six or seven hundred feet east of us and is the next industry. Its business is that of cut stone contractors, but I have no knowledge as to the nature of its traffic. It is on and adjacent to the
149 same track that our company is on and is about 700 feet east of us. It is served by a switch track, or

spur, leading off of the track immediately south of the plant. I do not know the conditions under which the track leading into the Heldmaier plant was constructed.

Cross Examination.

150 The shipments shown in my exhibit were both state and interstate. On most of them the Alton got switch revenue, but I have no knowledge as to the basis of the division of revenue on those ship-
151 ments between the various carriers. The shipments shown on page 4 of the complaint were both state and interstate. The Alton participated in them principally as a switching carrier. I have no knowledge of the division of revenue on those shipments as between the Alton and the other carriers.

152 M. R. HOAGLAND, a witness on behalf of The Alton Railroad Company was sworn and testified:

Direct Examination.

My name is Milton R. Hoagland. I am Office Engineer for The Alton Railroad Company, with office in Chicago, and have held that office since July 18, 1931. Prior to then I was Office Engineer for The Chicago and Alton Railroad Company and its Re-
153 ceivers. The receivership of Chicago & Alton Railroad Company extended from August 30, 1922, to July 18, 1931. The Chicago & Alton operated the property now owned by The Alton Railroad Company for many years prior to August 30, 1922. Respondent's Exhibit 5 is a blue-print showing the main line of The Alton Railroad Company, the right

of way line and the switch track leading from the main line of The Alton at Stark Street in Chicago to and beyond the plant of the Moulding-Brownell Company.

(Document marked Respondent's Exhibit 5). I personally prepared Exhibit 5 and know it to be correct, as representing the conditions existing in January, 1932. It also shows present conditions, except that it does not show an extension of the American Sand & Gravel Company track on the easterly end. The main line of the Alton lies about a block south of Hillock Street and runs east and west. It is immediately north of the C. M. & M. Railroad and A. T. & S. F. The right of way line of the Alton is shown with a line made with a dash and 2 dots. It runs east and west. The track colored in yellow on Exhibit 5 is an industry track built many years ago in approximately its present location. The tracks shown on lots 3 and 4 were those built by the Receivers of the C. & A. Railroad for the American Sand & Gravel Company in 1924. The Alton Railroad Company is an Illinois corporation which acquired the properties of the Chicago & Alton Railroad Company on July 18, 1931, and has operated those properties as a common carrier since then. I am familiar with the deeds, easements and agreements of the Chicago & Alton Railroad Company and the Alton Railroad Company relating to the properties in the City of Chicago and have made a search to determine whether or not they have any deed, license or easement covering the land occupied by the track shown in yellow on Exhibit 5. I have found no such document. There is a portion of the track lying between Stark and Mary

Streets on the right of way of the Alton which is owned by the Alton, but I have found nothing giving the Alton or its predecessors title to the land underneath the track shown in yellow on Exhibit 5. The only exception is the ordinance granting to the Alton
160 the right to cross certain streets. I have some of the official railroad records with me, showing tracks of the Alton in the vicinity of the territory covered by Exhibit 5. They consist of two maps dated in 1885, which, together, constitute the layout covered by Exhibit 5. On them the tracks of the Chicago & Alton Railroad Company are shown in red, and the
161 tracks owned by other people in blue. Prior to 1900 it was the practice of the Railroad to show on its maps tracks owned by it in red and tracks owned
162 by other parties in blue. The track shown in yellow on Exhibit 5 is shown on this 1885 map and is shown in blue. Exhibit 5 was prepared without looking
163 at the 1885 maps. Information showing the right of way of the Alton is carried along currently on the maps and the property lines do not change except as additional property is acquired. What is shown on the 1885 maps is the same condition with respect to streets, alleys, roads, etc., as is found on Exhibit 5. If the Alton acquired additional property a new map would be prepared showing it. (Respondent's Exhibit 5 admitted in evidence.)

164 I have also an official map made in 1897 showing the Alton tracks in red and all tracks not owned by it in blue. I have also a map made in 1897 in which the track in question is shown in blue, while
165 tracks owned by the Alton are shown in red. I also have a map from the files of the Alton dated 1894 showing the proposed track of the Heldmaier Stone

Company. The track is shown in blue and the Alton does not claim any ownership in it. It connects with the Cologne Street track immediately west of Throop Street. The large circle is the same one as shown
166 on Exhibit 5, except that I think about 130 feet were added to the Heldmaier track. The Cologne Street track on the 1894 map is the same as the yellow track on Exhibit 5. It is colored blue, showing ownership by parties other than the Alton. The 1894 map also shows a proposed track of the Heldmaier Stone Company, whereas Exhibit 5 shows the track as having been built.

167 *Cross Examination.*

There is no agreement in the file pertaining to the track to the Heldmaier Stone Company, but it is connected with the track along Cologne Street. It has been the practice of the Alton Railroad Company to lay the turnouts connecting its tracks with those of private industries over which it is going to oper-
168 ate. I also have a permanent record of the Chicago & Alton Railroad Company dated in 1897, which lists the Cologne Street track as a private side track. The track is shown as being 3537 feet in length, but there has been some extension of it down to the dock line in lot 6. Those tracks were built under a 1900
169 agreement. It is the same track except that there have been some extensions to it.

Re-Direct Examination.

I have the Alton's map a copy of which was attached to the agreement numbered Exhibit 4 and dated April 5, 1924. The signatures appearing on
170 page 5 are W. W. Wheelock and W. G. Bierd. The

blueprint attached is an Alton print. On that print
171 the portion of the track shown in red is the part lying between the point of switch and the point of clearance and is about 75 or 80 feet long. A portion of it is shown as lying on the property of the Sand & Gravel Company. The part of the track shown in green lies beyond the point of clearance and is on the property of the American Sand & Gravel Company. I am familiar with the switch track contracts
172 made by the Chicago & Alton Railroad Company
173 and its Receivers. It is customary for the Railroad to own and maintain that portion of a track lying between the point of switch and the point of clearance, so that no cars will be set down there to foul the track and interfere with operation. I made an
174 investigation of the ownership of the Cologne Street track and the indications were that it was owned by the Peoples Gas Light & Coke Company and perhaps the Commonwealth Edison Company. They paid the entire cost of the elevation of the track from Throop Street to its connection with our main line. The elevation was about 1903. I found nothing to
175 indicate that the Alton or its predecessors had borne any expense in connection with that track to the west line of Loomis Street. I do not know who constructed the track west of Loomis Street. Our rec-
176 ords show that the Alton paid for the extension of the tracks west of Loomis Street into lot 6. The Alton owns the extension of the track from a point in lot 4 down into lot 6 and then from a point in lot 4 up to Loomis Street. East of Loomis Street the
177 track is owned by the Peoples Gas Company, as far as I know.

Re-Cross Examination.

I do not know when the part of the track between Throop and Loomis Street was constructed and do not know who paid for it. It is colored in blue on
178 our maps, which is evidence that it was paid for by some one other than the Alton Railroad. We have no information that the track originally extened only to Throop Street. It was in its present location in 1885. On the blueprint attached to the contract of 1924 the track in green is owned by the American Sand & Gravel Company or the Moulding-Brownell Company, and the track in red is owned by the Alton. The track of the Moulding-Brownell connects with the track of the Alton. The Alton operates its
180 engines and cars over the entire piece of track down at the bottom of the Alton map, but our records indicate that the track is owned by other parties. We have been operating over it for at least 50 years.
181 Our records do not show that any right to so operate was ever granted. I do not know that I had any-
182 thing to do with the contract of April 5, 1924, but I usually did read those contracts. The red coloring
183 on the map attached to that contract does not indicate ownership. That particular piece of track is not shown on the maps to which I refer because it
184 was built after the maps were made. We have operated over this track for 50 years, but there is no record of how we secured the right. I do not know who pays the taxes on the property shown in red on Exhibit 5. The Alton bears the expense of maintaining
185 the track here involved from its connection with the main line near Stark Street, around and across Cologne and down to the west line of Loomis Street. So far as I know, it has always paid this expense.

The leads from this track into the industries are maintained by the industries themselves, which is the usual procedure on industrial tracks.

186 *Re-Direct Examination.*

The Alton operates over the so-called Cologne Street track to serve the Heldmaier Stone Company, the Moulding-Brownell Company, the Peoples Gas Light & Coke Company and the Commonwealth Edison Company. I am not familiar, however, with the extent to which the Commonwealth Edison Company is actually served. The operation has always been for the purpose of serving industries.

H. L. STUNTZ, a witness on behalf of the Alton Railroad Company, was sworn and testified:

187 *Direct Examination.*

My name is H. L. Stuntz. I am Assistant Comptroller of The Alton Railroad Company at Chicago, and was also Assistant to the Receivers of The Chicago and Alton Railroad Company. I have been in the accounting department of the Alton and its predecessors since January 1, 1929. The first ordinance
188 relating to the maintenance of the Cologne Street track shown on Exhibit 5 was dated in 1903 and ran to The Chicago and Alton Railroad Company and its assigns. That ordinance was assigned to the Peoples Gas Light & Coke Company, immediately after
189 passage. That ordinance permitted the maintenance of the track over the streets for 20 years. During that period, up to 1924, The Chicago and Alton Railroad Company and the Receivers paid the ordinance

charge to the City of Chicago. That charge was $300 a year. It was repaid to the Receivers of the Chicago & Alton by the Peoples Gas Light & Coke Company, which, between 1903 and 1924 bore the expense of maintaining the track in the public streets. A new ordinance was passed in 1924 running to the
190 Chicago & Alton Railroad Company, its successors and assigns. I don't know that that ordinance was assigned. It raised the cost to $1400 a year and we had a lot of negotiations with the Gas Company trying to get it to pay that charge. The Receivers of The Chicago and Alton and the Alton have paid it up to November 1, 1931, but since then the City has not been paid. The ordinance referred to by the
191 witness Hodgson reduced the charge to $700 from 1932 on, and that is the present charge. I do not know at whose request the 1932 ordinance was passed. The bills received from the City were against the Alton.

198 I said that we had paid the charges of the City up to November, 1931, but I should have said that we have paid them up to November, 1932. The Real
199 Estate and Tax Agent of the Alton had conferences with the Gas Company regarding the ordinance of 1924. He asked the Gas Company if it would pay the charge under that ordinance, and the ordinance was accepted by the Receivers of The Chicago & Alton under the impression that they had an agreement with the Gas Company to take an assignment of the ordinance and pay the charge under it. I have no record of any one paying any portion of the ordinance charge except the Gas Company.

200 J. L. HODGSON, recalled, testified as follows:

Direct Examination.

At the present time there are in effect state and interstate rates on the inbound and outbound traffic moving to and from the plant of the Moulding-Brownell Company, these rates being filed with the Illinois Commerce Commission and the Interstate Commerce Commission. My company gets the Chicago rate without any excess charge.

201 (Case marked "Heard and Taken.")

202 Order entered April 17, 1935, extending time for briefs until May 15, 1935.

203 Complainant's Exhibit 1, Docket 22201, being a statement showing that the Moulding-Brownell Company received 2,383 carloads of various commodities over the Alton Railroad in 1933 and 1,657 cars in 1934; and that on these cars the Railroad received estimated revenue of $37,243 in 1937 and $25,124 in 1934.

204 Complainant's Exhibit 2, Docket 22201, being a map of the tracks under consideration.

205 Complainant's Exhibit 3, Docket 22201, being a large scale map showing the tracks under consideration, the tracks being marked in red at points where they cross public streets.

206 Complainant's Exhibit 4, Docket 22201, being contract dated April 5, 1924, between W. W. Wheelock and W. G. Bierd, Receivers of The Chicago and Alton Railroad Company, and the American Sand and Gravel Company. Under this con-

tract, the Gravel Company granted to the Receivers an easement for the construction, maintenance and operation of a switch track upon the premises of the Gravel Company, in the location shown by the blueprint thereto attached. The Receivers undertook to construct the track and furnish the track material required between the point of switch and the
207 clearance point, and the Gravel Company agreed to furnish the track material and construct the track from the point of switch to the point of clearance. The Receivers agreed to refund the cost incurred by the Gravel Company at the rate of $2.00 a car on inbound or outbound shipments, on which the
208 revenue was $15 per car or more. Agreement recites that that part of the switch track shown in red shall be owned by the Receivers, and that part shown in green shall be owned by the Gravel Company, which agreed to maintain the entire track beyond the clearance point.

211 Blueprint referred to in Exhibit 4, Docket 22201, showing track to be constructed under Exhibit 4 in red and green coloring.

211-a Respondent's Exhibit 5, Docket 22201, being map showing track here involved colored in yellow.

212 Alton Railroad Exhibit 1 of January 12, 1937, containing copies of letters written with respect to said track.

232 Petition of The Alton Railroad Company filed on March 11, 1936 with the Illinois Commerce Commission, under its Docket 24391. Petition alleges that the Railroad is a common carrier for hire between points in the State of Illinois, and that for many years it has been rendering rail service to industries

in Chicago, by operation over a switch track shown in yellow upon the blueprint attached to the petition and marked "Exhibit 1"; that the industries thus served are the Commonwealth Edison Company, the Heldmaier Stone Company, the Moulding
233 Brownell Company and Peoples Gas Light & Coke Company; that said switch track was elevated under an ordinance passed by the City of Chicago in 1903, which ordinance imposed a license fee of $300 for maintaining the switch track across certain streets and alleys; that on November 1, 1904, said ordinance and the rights of the railroads thereunder were assigned to the Commonwealth Electric Company and the Gas Company under a contract of November 1, 1904, between The Chicago and Alton Railroad Company, The Chicago and Alton Railway Company, the Gas Company and the Commonwealth Electric Company, the predecessor of the Edison Company; that under said contract, The Chicago and Alton Railroad Company, its successors and assigns, also acquired the right to operate over said switch track during the term of the contract; that the industries agreed to and did pay the cost of elevating the switch track and the license fee imposed by the ordinance of 1903; that the ordinance of 1903 expired in 1923, and that thereafter a dispute arose be-
234 tween the Receivers of The Chicago & Alton Railroad and the industries then served by said track as to the payments to be made to the City and for the maintenance of the switch track thereafter; that in 1924 another ordinance was passed by the City of Chicago imposing a license fee of $1,400 a year for maintaining the switch track across the public streets and alleys and requiring the posting of a bond, in the amount of $10,000; that this ordinance was

accepted by the Railroad Company upon the understanding that the matters in dispute would be adjusted; that in May, 1934, under another ordinance, the license fee for maintaining the switch track was reduced to $700 a year; that negotiations between the industries and the Railroad with respect to the payment of fees to the City and the cost of main-
235 taining the switch track had been unsuccessful, and that the Railroad and its predecessors had been compelled to pay to the City of Chicago the license fees imposed by the ordinances of 1924 and 1934, had paid all cost of maintaining said track, and had kept the bond in the amount of $10,000 on file with the City; that The Alton Railroad Company, the petitioner, is the purchaser at judicial sale of the railways and properties of The Chicago and Alton Railway Company, The Chicago and Alton Railroad Company and the Receivers of The Chicago and Alton Railroad Company, and is now operating those properties; that The Alton Railroad Company had the right, under decree entered in
236 the Receivership proceeding, to elect not to assume the contract of November 1, 1904, and has elected not to assume it; that it will also cancel the bond for $10,000, and that when this is done, there will be no contract obligation upon petitioner to maintain said track, and no authority for maintaining it across public streets and alleys; that the petitioner
237 does not own any of the property upon which said track is constructed, except that part of it lying within its regular right of way, and does not own any part of said track except that part within petitioner's regular right of way lines; that by reason thereof there is no obligation upon The Alton Railroad Company to continue to maintain said track, or

to pay the license fees imposed by the ordinances of the City of Chicago, that obligation resting upon the industries if they desire the continuance of service over the track; that the uniform practice of petitioner in the case of all switch tracks extending
238 beyond its right of way is to require the maintenance and repair of such tracks by the industries served thereby and at their cost, and that any requirement that petitioner maintain the track here in issue will create an unlawful discrimination and preference; that petitioner is willing to continue service upon the switch track if the industries served by it will maintain it at their cost and pay the fees demanded by the City of Chicago; that petitioner
239 maintains rates to the industries on said track, but will cancel them as soon as it is authorized to discontinue operation over the track. The prayer of the petition is that an order be entered determining that the industries served by said switch track should pay all future costs of maintaining it and all license and other fees assessed under ordinance for its occupancy of public streets and alleys; and that in default of such payments petitioner be authorized to discontinue the rendering of service over the track and be authorized to cancel all rates applicable on traffic to and from said industries.

241 Blueprint attached to said petition, showing the track involved in solid yellow coloring. (This document offered and received in evidence as Petitioner's Exhibit 1 at page 255 of record.)

242 Petition served upon Commonwealth Edison Company, Heldmaier Stone Company Moulding-Brownell Company, and Peoples Gas Light & Coke Company, on March 12, 1936, and order entered setting

hearing for March 25, 1936. Order entered March 19, 1936, resetting case for hearing on March 27, 1936. Case called for hearing on March 27, 1936.

243 Report of proceedings had March 27, 1936, on the hearing before the Illinois Commerce Commission in its Docket 24391, "Petition of The Alton Railroad Company, etc."

Appearances—F. H. Towner,
for Petitioner,
Cooke, Sullivan & Ricks,
By H. D. Dines,
for Peoples Gas Light & Coke Company,
C. B. Cardy,
for Moulding-Brownell Company and Heldmaier Stone Company,
and
Isham, Lincoln & Beale,
By M. G. Sampsell,
for Commonwealth Edison Company.

246 Mr. Towner: When I filed this petition with the Commission I requested that this case be consolidated with the complaint of the Moulding-Brownell Company, Docket 22201. I think the cases should be consolidated.

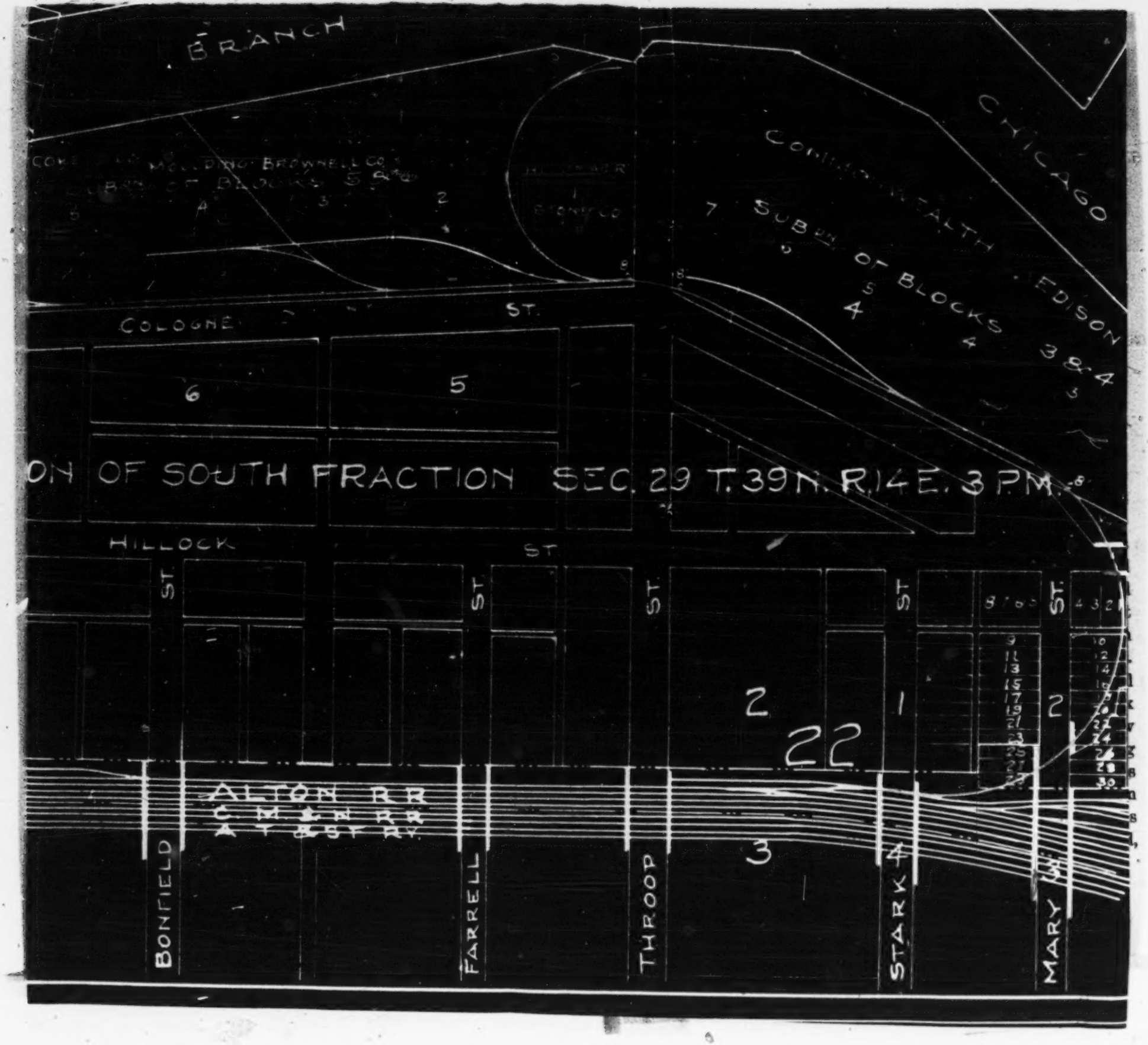
249 Examiner Daley: The motion will be taken with the cases and for the purposes of hearing the two cases will be treated as consolidated.

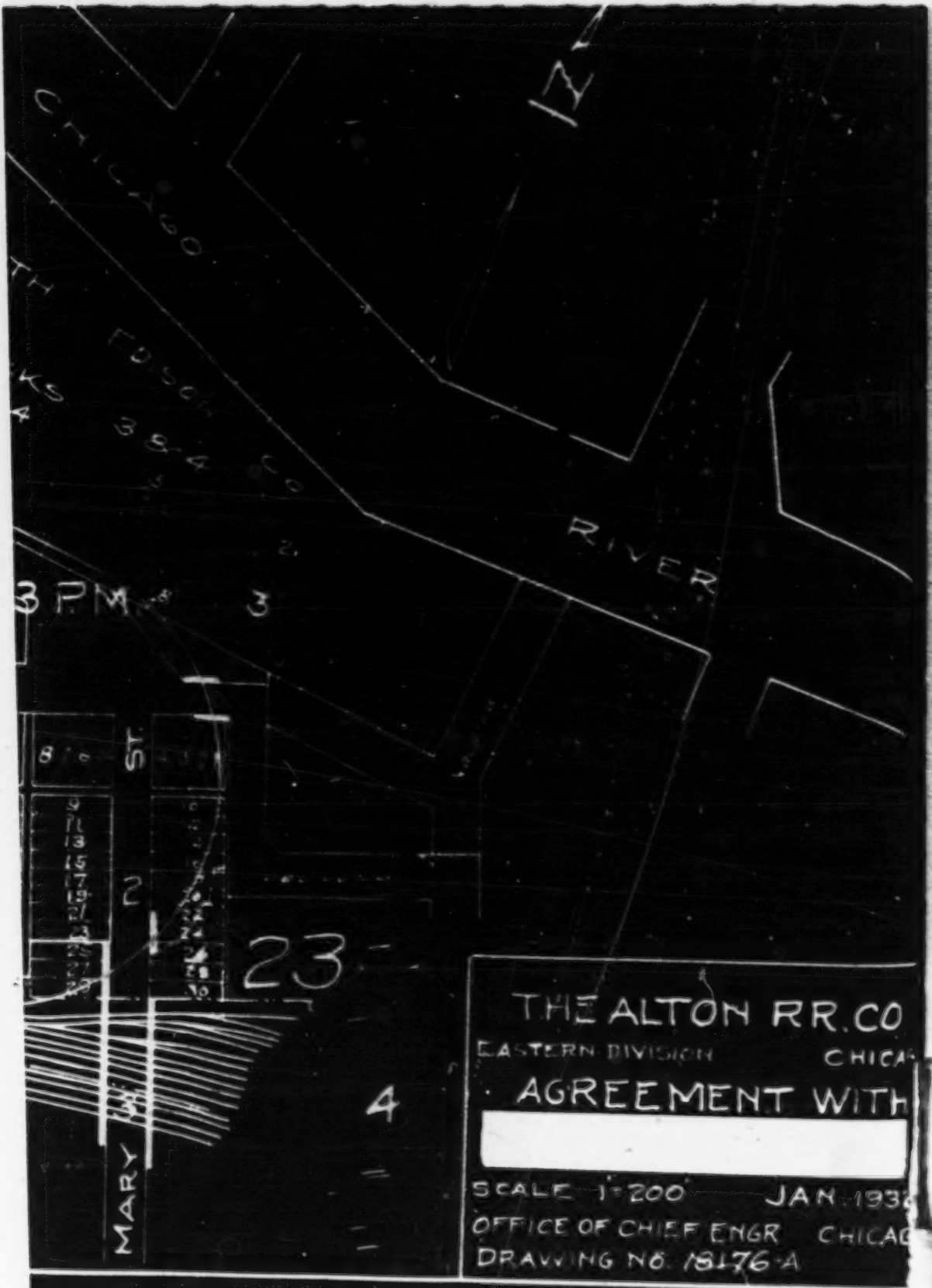
253 M. R. HOAGLAND, a witness on behalf of petitioner, was sworn and testified:

Direct Examination.

My name is Milton R. Hoagland and I am Office Engineer of The Alton Railroad Company. I have held that position since 1921. Before that I had been with the Alton and its predecessors since 1909.
254 I have always been in the Engineering Department. I have to work at construction plans and real estate and ownership matters. It is part of my duty to know what is owned by the Alton and what is not owned by it. I am familiar with the switch track extending from the main line of the Alton in the vicinity of Stark Street and which then turns and parallels what was known as Cologne Street. I have been familiar with the track for six or seven years. I prepared the blueprint attached to the petition filed with the Commission in this case. It accurately
255 shows in a yellow color the present location of the track I have mentioned. (Said map offered and received as Petitioner's Exhibit 1. It is reproduced on the following page.) The white lines running
260 off the yellow track shown on the Exhibit 1 are spur tracks. The one lying in lots 5, 6 and 7 of blocks 3 and 4 is owned by the Peoples Gas Company. The map indicates that the Commonwealth Edison Company owns lots 5, 6 and 7 in blocks 3 and 4, but the Peoples Gas Company actually owns those lots. The next track in lot 1 of blocks 5 and 6 serves the Heldmaier Stone Company. West of
261 this track is the easterly connection of the Moulding-Brownell Company, which was installed about

SOUTH
BRANCH
PEOPLES GAS LIGHT AND COKE CO
SUBDN OF BLOCKS 7, 8 & 9
MOULDING BROWN
SUBDN OF BLOCKS
COLOGNE
8
7
6
9
CANAL TRUSTEES' SUBDIVISION OF SOUTH
HILLOCK
ST
FULLER
ST
ST
ST
ILOCK
GREELEY ST
GRADY
ST.
LOOMIS
BONFIELD


BRANCH
CHICAGO
COMMONWEALTH EDISON
7 SUBDN. OF BLOCKS 3 & 4
5
4
3
COLOGNE ST.
6
5
ON OF SOUTH FRACTION SEC. 29 T. 39 N. R. 14 E. 3 P.M.
HILLOCK ST.
ST.
ST.
ST.
ST.
ST.
2
1
22
3
4
ALTON R.R.
C.M.&St.P. R.R.
A.T.&S.F. RY.
BONFIELD
FARRELL
THROOP
STARK
MARY


CHICAGO
RIVER
3 P.M.
3
ST.
MARY
23
4
THE ALTON R.R. CO
EASTERN DIVISION
AGREEMENT WITH
SCALE 1" = 200'
JAN. 193
OFFICE OF CHIEF ENGR
CHICAG
DRAWING NO. 18176-A

1932, and further west is another Moulding-Brownell track, built for the American Sand & Gravel Company in 1924. In lot 5 of blocks 5 and 6 on Exhibit 1 there is a stub track crossing Loomis Street and entering the plant of the Gas Company. All those tracks are spur tracks leading off of the track here involved, which is shown in yellow on Exhibit 1. The question of maintenance and street rights here involved is in connection with the track shown in yellow lying east of the west line of Loomis
262 Street. The main line of the Alton runs approximately east and west and its right of way is indicated by a broken line of a dash and two dots. The Union Station would be to the right hand of Exhibit 1. Immediately south of the Alton main line is the main line of the Illinois Central, and south of that is the main line of the Santa Fe. Exhibit 1 accurately shows the present layout of the track in question and the tracks leading off it. I
263 have made an examination of the records of the Alton to determine the ownership of the tracks shown in yellow on Exhibit 1. I have examined all of the correspondence files and the maps, and the earliest map I find is one of July, 1884. At that time the Alton tracks were shown on its maps in red and the tracks owned by other parties in blue.
265 That practice has been followed in making up all of the older maps. I do not know when the track here involved was constructed, but our maps show it in existence in 1884. I failed to find anything prior to 1884. I do not have copies of the various maps of this track which I have now located. On the map of July, 1884, this particular track was
266 colored blue, showing that it was privately owned,

and the main line of the Alton was shown in red. That map does not show all of the track as it now exists, but only shows the portion that was then
267 constructed. I am able to identify it, however, as the track here involved. I also located two maps made in 1885, on a larger scale than the 1884 map. They bear the inscription "Corrected August 1, 1885," and show the track in question colored blue and extending into lot 3 of blocks 3 and 4. The second portion of the map shows the track colored blue and extending down Cologne Street to the
268 plant of the Gas Company, which is designated as the Chicago Gas Light & Coke Company, a predecessor of the Peoples Gas Light & Coke Company. The 1885 map shows the track as stopping just east of Deering Street, now known as Loomis Street. The plant was just west of Loomis Street. I conclude that the extension across Loomis Street to the plant of the Gas Company was made after the 1885 map was made. On both 1885 maps the
269 track in question is colored blue and the main line of the Alton is shown in red. The other tracks colored in blue on this map are owned by parties other than the Alton. There is one leading to the Ware
270 Johnson Company and one to Cox Brothers, both colored blue. The next map I found was dated
271 April 15, 1887, which shows the main line and side tracks of the Alton in red, and it shows the track in question in blue, again showing private ownership. The 1887 map does not show the track as it now exists, as spurs have been added to it, and it also shows some tracks that are no longer there. It shows a track on the west side of Deering, or Loomis Street to the plant of the Gas Company

as a proposed track. The next map I found is dated in January 1888. It also shows tracks owned by the Alton in red, and shows the track in question, along with others, in blue. The next map I found
272 is dated July, 1892, and shows a proposed extension of the track in question to the Gas Company. On this map also the track is colored in blue. The next map I found was dated October, 1892, and, in addition to the extension proposed on the map of July, 1892, shows a further extension of approximately 600 feet west. The proposed extension is
273 also shown in blue. It bears the inscription "Showing by blue lines the Gas Light & Coke Company track. Showing by dotted blue line track wanted by the Gas Light & Coke Company." The blue line on this map comes up to a point immediately west of Deering, or Loomis Street and includes all the construction that was in or proposed in 1887. The next map I found is dated April
274 26, 1894, and shows a proposed track to the Heldmaier Stone Yard. The track in question is shown in solid blue and the proposed track is shown added in blue. The track proposed on this map of 1894 was presumably constructed, as it is shown on Petitioner's Exhibit 1, as connecting with the track shown in yellow. The next map I found is dated
275 in June of 1894. On it the Heldmaier track is shown in solid blue, indicating that it had been built subsequent to April, 1894. The track in question is also shown in solid blue. The next map I found is dated March 2, 1897, and shows the track in
276 question in blue, together with the main line of the Alton in red. I also found a map dated February 16, 1897, made in connection with an application for a track by the Corneau Lumber Company, im-

277 mediately west of the Heldmaier property. All of the track in question is shown in blue, as is the track proposed. Apparently at that time there were two tracks paralleling each other on the north side of Cologne Street, instead of one, as now. The next map I found is dated in May, 1898, and shows the right of way and tracks of the Alton from Stewart Avenue to Bridgeport. On this map the main line of the Alton is shown in red and the track in question, together with the track leading off of it, are all shown in blue. The entire track is shown
278 as extending northward from the Alton main line across Mary Street and Hillock Street, and then paralleling Cologne Street on the north side of the street in a general easterly and westerly direction. It is all shown in blue. Some spur tracks extending from the main line of the Alton are shown on this map in red, which indicates that they were
279 tracks owned by the Alton. I do not know whether they were maintained by the Alton, but they do indicate ownership by the Alton. I also have the original Road Master's record of the ownership of
280 tracks in 1898. In this book tracks owned by the Alton were designated "Permanent side tracks," and under it is listed the lead to the Cologne Street track, with a total length of 150 feet. Under the heading of "Private side tracks" is shown the Cologne Street track here in issue, with a total length of 3537 feet. In referring to the lead to the Cologne Street track, the book refers to the track connecting with the Cologne Street track here in issue within
281 the right of way line of the Alton. The 150 feet of track was a spur leading off from the main line of the Alton, but on the Alton right of way, and con-

necting with the Cologne Street track here involved. The book shows that the Alton owned that part of the track located on its right of way and that it did not own that part of the track which was not located on the right of way. I also discovered a
282 blueprint dated February 10, 1904, made by the Commonwealth Electric Company and setting out a proposed readjustment of these tracks. It presented a plan for the elevation of a part of the track here involved, and the track as it exists today shows agreement with that plan. The foregoing
283 are all the maps I was able to locate dealing with the track here in issue.

Mr. Towner: I do not have copies of these maps but will furnish them if anybody wants them.

Mr. Dines: The Gas Company will waive them.

Mr. Cardy: I assume the map attached to your petition tells the story, but I would like to have pages 180 to 197 of the book listing the side tracks.

285 The Witness: Page 180 of that book shows the
286 permanent side tracks leading from the main line of the Alton to connections and industries. The term "Permanent side tracks" in the book indicated tracks owned by the Alton. The names indicate the various industries located upon the side
287 tracks. The permanent side tracks as shown in this book are not necessarily maintained by the Alton, as we own many tracks which industries are bound to maintain under contract. Most of these side tracks are covered by separate agree-
288 ments. Some of the tracks are shown in the book as cross-connections, which might indicate tracks connecting the Alton tracks with other tracks. The

term "Permanent side track" does not always indicate that an industry is located on the side track.
289 The maps about which I have testified are all the original maps I have been able to locate indicating the ownership of the track here involved, and all of them show that the track is not owned by the Alton.

The first contract I found relating to the switch track here involved was dated November 15, 1900.
290 It is between The Chicago and Alton Railway Company and the Peoples Gas Light & Coke Company. The blueprint which was supposed to be attached to it was identical with the one which is attached to the next succeeding contract. (Said document offered and received in evidence, marked "Peti-
291 tioner's Exhibit 2.") All of the track shown in yellow on Exhibit 1 is covered by Exhibit 2, which
292 recites the existence of all the track down to lot 3 in block 8 and provides for the construction of an extension from lot 3 in block 8 over lots 4, 5 and
293 6. Petitioner's Exhibit 3 is a copy of an ordinance passed by the City Council of Chicago on November 2, 1903, providing for the elevation of a portion of the track shown on Exhibit 1. The track was elevated from the point of connection at Stark Street around to the east line of Throop Street. (Said document offered and received in evidence, marked "Petitioner's Exhibit 3".) Petitioner's Ex-
294 hibit 4 is a copy of an agreement dated November 1, 1904, between The Chicago and Alton Railway Company, Peoples Gas Light & Coke Company and the Commonwealth Electric Company. The Chicago and Alton Railway Company was the predecessor of petitioner and the Commonwealth Elec-

tric Company was the predecessor of the Commonwealth Edison Company. This contract relates to the partial elevation and future maintenance and operation of the track here involved. (Said docu-
295 ment offered and received in evidence, marked "Petitioner's Exhibit 4.") Petitioner's Exhibit 5 is a
296 blueprint which was attached as Exhibit 1 to Petitioner's Exhibit 4, and shows in colors the portion of this particular track which was to be elevated under the ordinance introduced as Petitioner's Exhibit 3. We have no record showing that the track shown on Exhibit 5 at the west end of the track in the sub-division of blocks 7, 8 and 9 was actually built in the position shown. They were supposed to be built in that location under Petitioner's Ex-
297 hibit 2, but were extended in a straight line across lots 4, 5 and 6 in the sub-division of blocks 7, 8 and 9, as shown on Petitioner's Exhibit 1. (Petitioner's Exhibit 5 offered and received in evidence, marked "Petitioner's Exhibit 5.") Petitioner's
298 Exhibit 6 is a copy of an assignment of the 1903 ordinance for the elevation of this track, by The Chicago & Alton Railway Company and The Chicago & Alton Railroad Company to the Commonwealth Electric Company and the Gas Company. The Chicago and Alton Railway Company and The Chicago and Alton Railroad Company were predecessors in interest of petitioner, and the assignment was actually made pursuant to the provisions of the contract identified as Petitioner's Exhibit 4. The blueprint referred to in Exhibit 6 is identical
299 with the blueprint which has been introduced as Petitioner's Exhibit 5. (Said document offered and received in evidence, marked "Petitioner's Exhibit

6.") Petitioner's Exhibit 7 is a copy of an agreement between the Commonwealth Edison Company and The Chicago and Alton Railroad Company to provide a trestle for an opening beneath the track as shown on Exhibit numbered 1. Attached to Exhibit 7 is a blueprint identifying the location of the work to be done. (Said document offered and received in evidence, marked "Petitioner's Exhibit 7.")

Petitioner's Exhibit 8 is the blueprint attached to the contract introduced as Petitioner's Exhibit 7. (Said document offered and received in evidence, marked "Petitioner's Exhibit 8.") Petitioner's Exhibit 9 is a copy of an agreement between W. W. Wheelock and W. G. Bierd, the Receivers of The Chicago and Alton Railroad Company and the American Sand and Gravel Company, dated April 5, 1924. It provides for the construction of a track leading from the track in question, as shown on Exhibit 1, to serve the American Sand and Gravel Company, which has now been succeeded by the Moulding-Brownell Company. (Said document offered and received in evidence, marked "Petitioner's Exhibit 9.") Petitioner's Exhibit 10 is a blueprint which was attached to the contract introduced into evidence as Petitioner's Exhibit 9, and shows the construction provided for by that contract. (Said document offered and received in evidence, marked "Petitioner's Exhibit 10.") Petitioner's Exhibit 11 is a copy of an ordinance passed by the City Council of Chicago on December 10, 1924, imposing a charge of $1400 a year for maintaining the switch track here involved across public streets and alleys. (Said document offered and received in evidence,

marked "Petitioner's Exhibit 11.") Petitioner's
305 Exhibit 12 is a copy of a proposed agreement between petitioner and the Moulding-Brownell Company covering the installation of a connection between an existing track of Moulding-Brownell and the track in question as shown on Exhibit 1. It is dated April 7, 1932, but was not executed by the Alton Railroad. The track itself was actually built and is shown in red on the blueprint attached to the contract. Petitioner's Exhibit 1 also shows this
306 track as having been constructed. (Said document offered and received in evidence, marked "Petition-
307 er's Exhibit 12.") Petitioner's Exhibit 13 is a blueprint which was attached to Petitioner's Exhibit 12 and shows in red the track provided for by Exhibit 12. (Said document offered and received in evidence, marked "Petitioner's Exhibit 13.") Pe-
308 titioner's Exhibit 14 is a copy of an ordinance of the City of Chicago dated May 9, 1934, reducing from $1400 a year to $700 a year the charge for the occupation of streets and alleys by the switch track here involved. The ordinance only reduced the $1400 fee imposed by the 1924 ordinance to $700 a year. (Said document offered and received in evidence, marked "Petitioner's Exhibit 14.") Pe-
309 titioner's Exhibit 15 is a copy of the election of petitioner not to adopt the agreement of November 1, 1904, between The Chicago and Alton Railway Company, the Gas Company and the Commonwealth Electric Company, which agreement was introduced as "Petitioner's Exhibit 4." This election has been filed in the office of the Clerk of the District Court. (Said document offered and received in evidence, marked "Petitioner's Exhibit 15.")

310 Mr. Towner: This election to disaffirm was authorized by the Decree of Foreclosure and Sale and the deed under which petitioner was authorized to take this action. I will not supply a copy of that Decree if there is no request for it.

312 Mr. Dines: I don't care for it.

Mr. Cardy: We don't want it.

313 Petitioner's Exhibit 16 consists of copies of three letters between petitioner and the Commonwealth Edison dated January 26, 1910, February 7, 1910, and February 15, 1910. They relate to operation by the predecessors of the Alton over the side track here involved and its right to so operate subsequent to January 1, 1910. (Said document offered and received in evidence, marked "Petitioner's Exhibit
314 16.") Petitioner's Exhibit 17 is a copy of a letter dated January 31, 1911, to the Chief Engineer of The Chicago and Alton by a representative of the owners of property abutting on the track here in issue other than the Gas Company and the Edison Company. The letter refers to a contract of July, 1905, which I have not been able to find. I exam-
315 ined the records of the Alton but can find no record or copy of the agreement. The letters contained in Petitioner's Exhibits 16 and 17 came from the correspondence files of the Alton. (Said document offered and received in evidence, marked "Petitioner's Exhibit 17.") Petitioner's Exhibit 18 is an
316 estimate of the annual cost involved in maintaining the track in question, as shown on Exhibit 1. It is an estimate of future expenses. The annual running repairs total $998 per year. The expenses listed under reconstruction costs will probably be in-

curred in the next three years, excepting the reconstruction of steel bridges, which is set up on a
317 basis of 18 years. The running repair expenses, however, would be current in every year. We have no record of what the Alton has spent maintaining this track in the past years, as the expenditures were not segregated. It is reasonably certain that for the next three years, at least, the annual cost of maintaining the track will be almost $4,000 a year. (Said document offered and received in evidence, marked "Petitioner's Exhibit 18.") The
319 Alton and its predecessors have operated over the track involved at least since 1904. I know nothing about the facts prior to then. At the present time
320 and for some years, however, it has operated over the track serving the industries. During all that time the Alton Railroad or its predecessors have paid for maintaining the track, and so far as I know, no one has refunded these amounts to the Alton, except that on that part of the track shown in yellow, west of the west line of Loomis Street, the maintenance has been paid by the Gas Company, as the track is within its plant. We do the work and send
321 the bills to the Gas Company. The Alton pays the maintenance on that part of the track shown in yellow on Exhibit 1 east of Loomis Street and around to the connection with the main line of the Alton, and does not collect this amount from anybody. We maintain the tracks to the Heldmaier and Moulding-Brownell concerns, but they pay us for
322 it. In the case of the spur shown in lots 5, 6 and 7 of blocks 3 and 4 on Exhibit 1, we maintain up to the heel of the frog, and beyond that the maintenance is paid by the Gas Company. The track that we maintain as shown on Exhibit 1 is that portion of

the track shown in yellow east of the west line of Loomis Street around to the connection with the
323 main line. To some extent I have supervision of side-track agreements between the Alton and industries, and have had occasion to work on those agreements. I am generally familiar with the provisions of such agreements. Most of those agree-
324 ments have clauses dealing with the construction and maintenance of the tracks. The form handed me is the standard form of switch-track agreement entered into by the Alton and industries with respect to switch tracks, and, generally speaking, all side-track agreements made by the Alton are in
325 this form. That is particularly so of paragraphs 2 and 3 of the standard form dealing with the location of such tracks and the expense of maintaining, repairing and renewing them. Under paragraph 2 the industry grants to the railroad an easement for the construction, maintenance, operation and
326 repair of any such track and the necessary easement for clearance, and undertakes to get such an easement in case the track crosses property owned by any other party. Under paragraph 3 the railroad agrees to maintain, repair and renew the track, but the industry agrees to pay the cost thereof within 20 days after receiving a bill therefor. The paragraph also provides that if the track serves more than one industry, the cost of the maintenance
327 shall be divided among the industries. I am generally familiar with the side-track agreements in effect between the Alton Railroad and industries served by it, and have examined them to ascertain whether or not there are any agreements under which the Alton secures the right of way for side

tracks or pays for maintaining them. I have found
328 no such agreements. The track here in issue is the only one that I know of where the Alton pays for maintenance. In all other cases the industry furnishes the right of way and maintains, repairs and renews the track. In some cases the industry even maintains track which we own and is on our right of way, but in no case does the railroad maintain track which it does not own and is not on its right of way. The right of way of the Alton is gen-
329 erally shown on its map by lines consisting of a dash and two dots. On Petitioner's Exhibit 10 the track here in issue is shown as being within the
330 right of way and lines of the Alton, but that was done because we had to have clearance in connection with the operation of the track, and the right of way line was put on that map, not to designate our ownership of the property, but to designate the clearance required by all. On Petitioner's Exhibit
331 13 the track north of Eleanor Street is shown within Alton right of way marks, but that also was only to indicate the clearance required. In neither case does the use of these marks indicate ownership by the Alton.

Cross Examination.

332 The track shown in yellow on Exhibit 1 is 2831 feet in length from the point of switch at Stark to the west side of Loomis Street, where the gate of the Gas plant is located. In addition, there is about 1100 feet of track inside the Gas plant. The track in question was originally built from the connection at Stark Street to a point in lot 5 east of Loomis Street, or about 2500 feet. In 1887 it was extended across Loomis Street into the Gas Com-

333 pany. Later it was extended to lot 3 in blocks 7, 8 and 9, and thereafter to the end of lot 6. I do not know that the Alton has operated over the track since 1887. The maps indicate that the track was there and connected with the Alton track. I do not know who constructed the track in the first instance. We now serve three industries on this track. The
334 Illinois Central does not use it. Five spur tracks extend from the track in issue into various indus-
336 tries, as shown on Exhibit 1. Our standard form of side-track agreement does not cover a situation like this one. The standard agreement applies when a track cuts out of an Alton track on Alton right of way to an industry. Exhibit 12 does not cover
337 substantially the same situation that would be covered by the Alton standard agreement. Under the standard agreement the Alton would own the track from the point of switching to the point of clearance; would own the track from the point of clear-
338 ance to the property line; and the lessee would own the track outside of the property line. The agreement would also provide that the Alton would maintain the track from the point of switch to the point of clearance and that the industry would maintain the track from the point of clearance beyond. Exhibit 12 has no such provisions. The Alton
339 and its predecessors have had a right to operate over the track shown in yellow on Exhibit 1 since 1904, but I am not sure that that right has been unrestricted. During that time the Alton has maintained the track under the terms of the contract. I do not know who owns the land
340 under this track. I do not know that any shipper
341 has ever attempted to interfere with Alton operation over that track in the last three or four years.

342 I estimated the running repairs on this track by going out and looking at it. The switch ties and bridge ties have to be renewed from time to time and are renewed as needed. It would cost $2639 to renew all the ties of the track and the average annual cost would be one-tenth of that. There is approxi-
343 mately half a mile of track involved. The annual running repairs of approximately $1,000 are a little high because this track has a lot of bridging in it. An ordinary side track has no bridge. I have not guessed as to the replacement each year on this particular track. I have estimated the cost based on a
344 knowledge of a life of timber. This track is laid with 18-pound rail and our company does not buy that rail. When we relay that track it will be relaid with 90-pound rail. In the last few weeks we have had two broken rails in the track and when I walked over it yesterday I saw a rail broken in the joint.
345 Two of these rails have been replaced. This is evidence that the track has about served its usefulness and that all rails will have to be removed within three years. The track has been maintained, but rail has a definite life and much of this rail is on a curve and subject to heavy use. I don't know when the track was last relaid. The bridges were
346 constructed in 1904. The life is commonly taken as 50 years, which leaves about 18 years of remaining life in the steel bridges. The trestle has been
347 rebuilt since it was originally built. Its condition is bad now and it must be renewed within three years. It was originally constructed in 1904. It has a longer life than ties because it is not in the
348 ground. The amount of maintenance a track requires is reflected to some extent by the traffic over it. Use of track affects maintenance cost, and not

349 construction costs. The figures in Exhibit 18 were estimates based on my knowledge as a railroad engineer, although it is not based upon tests in connection with this particular track. We could not segregate the cost of maintaining this track in past
351 years from our other costs. The Alton does not maintain any switch tracks in the Chicago district not located on its right of way and not owned by it. Our standard form of agreement has been lately revamped, but is similar to the one that was used
352 prior to 1931. The provision requiring an industry to maintain the track has been in that contract as far back as 1905. The track here in issue was a special condition, and evidently called for a special
353 contract. A City ordinance of Chicago, passed in 1900, required the elevation of the Alton's main tracks, and this track had to be elevated in order to connect with the main track. The cost of that elevation from Throop Street to Stark Street was paid half by the Gas Company and half by the Edison Company. The track is not elevated across Loomis Street. The approximate cost of the eleva-
354 tion was $37,000. The contract under which the Alton operated over the track could be terminated on a year's notice. We have served other industries on the track since the date of the agreement. At
355 one time the Edison Company and the Gas Company attempted to collect $12,000 from some concern for service over this track, but so far as I know they never got it. Permission had to be secured from the City of Chicago where this track was constructed across streets.

356 The license fee was paid to the City of Chicago from 1904 to 1924 by the predecessors of the Alton

and this amount was afterwards paid to the predecessors of the Alton by the Gas Company. The payments began as of November 2, 1903. Since that time the Alton has been serving industries other than the Gas Company off this track. Our
357 officials considered the location of other industries on the track a matter for the Edison Company and the Gas Company. I do not know that the Alton received any benefit from those other industries. The last line on Exhibit 18 relating to taxes represents taxes that the Alton seems to have paid in error and is based on the last taxes that were paid.
358 During the time that the Alton paid those taxes the item represented an expense. It appears that the Alton, by mistake, paid taxes on property which it did not own. The standard form of agreement
359 usually covers a case where only one firm is involved. There are no service connections from the track shown in yellow on Exhibit 1 into the property of the Edison Company. Before that track was elevated there were tracks leading from it into the property of the Edison Company, and when the agreement of 1904 was made provision was made for the construction of a track extending over through lot 3 in Blocks 3 and 4 and across Hickory Street. I don't know whether the industry was a tenant of the Edison Company, or whether the Edi-
360 son Company expected to use the track. There was an estimate of about $1600 to cover the cost of that track, but it was never built. The Edison Company has never received service over the track, but the presence of the track on its property adds value to that property. The Edison Company has a connec-
361 tion with the Alton east of Quarry Street, and that route is used. None of its traffic comes in over the

track here in issue, although I think that along in 1914 or 1915 some material was delivered on this track. Since then there has been none to my knowledge.

362 *Re-direct Examination.*

The track here in issue is elevated across Stark Street, Mary Street and Hillock Avenue, although Hillock Avenue may designated as Hickory Street at that point. The bridges are steel ballast deck bridges. Prior to 1904 the track was on the ground across these streets. Some of the contracts entered into by the predecessors of the Alton with industries are still in effect. On none of them does the Railroad
363 Company pay for the maintenance of tracks not located on its right of way, except in a few isolated cases, where the track was laid on land and maintained by us as a condition of the deed by which we acquired our right of way. The Alton has never paid anything to an industry served by a track if a second industry comes along and wants to use the track. The payment in that case would be made to the first industry. The Alton never has had any-
364 thing to do with that. I know of no case where we have built a track under an agreement to serve two industries, but in one case I know of another industry came along on the same track after it was built.
365 The track was then extended at the expense of the second industry, but we had nothing to do with it and made no payment on account of it.

C. D. SIPE, a witness on behalf of petitioner, was sworn, and testified:

Direct Examination.

My name is C. D. Sipe, and I am assistant to the Vice-President of The Alton Railroad Company. The Vice-President is the chief officer of the Rail-
366 road. I have been connected with the Alton and its predecessors since February, 1908, and I have been assistant to the Vice-President of petitioner since July 18, 1931. I was connected with The Chicago and Alton Railroad Company and its receivers.
367 The Chicago and Alton Railroad Company went into receivership August 13, 1922. W. G. Bierd and W. W. Wheelock were the Receivers appointed by the District Court in Chicago. The receivership ended on July 18, 1931, when petitioner acquired the property at the foreclosure sale. It has since oper-
368 ated the property. I am familiar with the track involved in this proceeding and have been particularly familiar with it since 1928. The ordinance of November 2, 1903, of the City of Chicago called for a license fee of $300 a year. From that time until 1923 the Gas Company paid the license fee. The ordinance itself was assigned to the Gas Company and the Edison Company in November, 1904. I
369 am also familiar with the ordinance passed in 1924, Petitioner's Exhibit 11, and the amendment thereto, by which the license fee was reduced to $700 a year. All of the payments made under the last two ordinances have been made by the Receivers of The Chicago and Alton Railroad Company and the Al-
370 ton. $1400 a year was paid from November 2, 1923, until November 2, 1932. The Receivers also posted

the bond required by the ordinance of 1924 and have paid $10 a year premium on it up to November 2, 1936. In 1923, 1924 and 1925 the Gas Company refunded to the Receivers $300 of the $1400 paid by the Receivers to the City in those years, and thus paid a total of $900. Since November 1, 1932,
371 petitioner has paid the $700 a year required by the ordinance passed in 1934, and has also paid the premium on the bond. The fees and the premium are now paid up to November 2, 1936. No portion of the amounts paid by petitioner has been repaid to it by anybody, and the bond is still in effect. Petitioner does not propose to pay the premium
372 on that bond after November of this year, and I imagine the bond will be cancelled and the City will order the tracks out of the street. I am familiar with the discussions between the Receivers and petitioners and the industry served by this track in connection with the future operation and maintenance of the track and the payment of the license fees. The Receivers were under the impression that when the 1903 ordinance expired, the contract of November 1, 1904, required the Gas Company and the Edison Company to continue to pay the increased license
373 fee. We concluded that from the provisions of Article V of the 1904 contract. It was clear that after the 1903 ordinance expired a further ordinance would be necessary, and the Receivers assumed that the
374 Gas Company and the Edison Company would renew the ordinance and continue to pay the fee. The matter dragged along until December, 1924, when the Receivers received a notice from the City that they would have to decide about adopting the new ordinance. Mr. Green, the Real Estate and Tax Agent, was sent to call upon the Edison Company. I know

of no negotiations with respect to the matter with the Receivers' office, but the Receivers asked Mr. Green to call on the Edison Company and the Gas
375 Company and find out what they would do. As a result of the conferences the Receivers of The Chicago and Alton Railroad Company filed an acceptance of the 1924 ordinance and posted the bond, with the understanding that the fee required by the ordinance would be paid by the Gas Company. Since
376 that time the Alton and the Receivers have been required to pay all of these fees. Negotiations were also carried on between the Receivers and the Alton on the one hand, and the industries on the other. In 1928 the Gas Company said it would be willing to pay one-half of the license fee of $700 a year until 1928, and would pro-rate the fee subsequent to that time with the other industries, provided we
377 would maintain the track. The last proposition made was that the Gas Company would pay $700 of the license fee after it was paid by the Alton in
378 1931, and that thereafter it would pay $300 a year if Moulding-Brownell would pay $200, Heldmaier $100, and the Alton $100, with the further understanding that the Alton would maintain the track. That proposition came to me from our lawyers, and was the last one submitted. The Vice-President re-
379 fused to accept it and instructed the legal department to take such action as was necessary to cancel existing contracts and require the industries to maintain their own property and pay the fees to the City.

380 *Cross Examination*

The last proposition made to me was made after the $700 ordinance was passed. The proposition was that the Gas Company would pay to the

City $300 a year, Moulding-Brownell $200 a year, Heldmaier $100 a year, and the Alton $100 a year, providing the Alton continued to maintain the track.
381 I don't know where the proposition originated, but it came to me from our lawyers. I know nothing about any agreement of counsel. There was no agreement in 1924 with the American Sand and Gravel Company that it was to pay any franchise
382 tax. The premium on the bond of $10,000 posted under the ordinance of the City is $10 a year. I am familiar with the provisions of Article VII of Petitioner's Exhibit 4. Under it the Gas Company and
383 Electric Company assume the obligations of the Railroad under the ordinance. Those companies complied with that provision. Article V of the contract, however, referred to future ordinances. I
384 know of nothing in the contract requiring the Gas or Edison Company to comply with the provisions of the 1924 ordinance.

Re-direct Examination.

The last four years license fees required by the ordinance were paid by the Alton in the last few months after suit had been brought against it and against its bondsman. The Railroad paid in order to protect the bondsman, but after November 1st
385 we will not have a bondsman to protect.

Re-cross Examination.

We made an estimate of the traffic that we handled over the track in issue in 1934, and found that the revenue was around $40,000. I don't know that that would be profitable for us. I made no careful
386 investigation to determine what net revenue we were

getting out of the track. Our thought is that we are not required to maintain property that we do not own and which is not on our right of way.

387 H. F. GREEN, a witness on behalf of petitioner, was sworn and testified:

Direct Examination.

My name is H. F. Green, and I am Real Estate and Tax Agent of The Alton Railroad Company. I have been connected with the Alton and its predecessors about 23 years, and since 1918 have been Real Estate and Tax Agent. It is true that the Alton paid taxes on the track here involved for some period.
388 We found that we had paid back to 1928. I filed the tax returns. After getting the total number of feet of all side track from the engineers, I supplied that figure to the tax authorities in the return. When I returned this particular track for tax purposes I did not know that I was including it. I first discovered about a month ago that we had been paying taxes on
389 this track. It has now been eliminated from the next return. I had a number of negotiations in connection with the acceptance by the Alton of the 1924 ordinance. At that time I was advised by the City Hall that the time for acceptance would expire the next day. I reported this to the Receivers and was told to handle the matter. I found it had been handled with Mr. Huston of the Edison Company, so
390 I called him up. He suggested I talk with Mr. Gilchrist, and I talked with Mr. Gilchrist the next day, which was the last day. Mr. Gilchrist called in his lawyer and they concluded that since the Gas Company was more vitally interested we should

go to see the lawyers for the Gas Company. I told Gilchrist that the Receivers would not file the acceptance of the ordinance unless they were reim-
391 bursed for the license fee by the Edison Company and the Gas Company. When we got to the office of the lawyers of the Gas Company, I explained that it was a matter of our not paying the $1400, but I was told that since we had had so much difficulty in getting the ordinance, we had better file the acceptance. In accordance with this, and on the assurance that the Gas Company would pay the $1400 a year, I filed the bond and the acceptance.

392 *Cross Examination.*

When I went to the office of the lawyers of the Gas Company I was told that since it was Saturday morning, something would have to be done in a very
393 little time. The Edison Company people said that they only had a small interest in the matter and that the Gas Company was more interested. I said that the Gas Company made the principal use of the track, and Judge Cook then said that under the circumstances there was nothing to do but accept the ordinance. This particular track does not come
394 under the Alton mortgage, as we do not include under the mortgage all property upon which we pay taxes. The only property subject to the mortgage is property on which we have the record title. The taxes
395 we paid were only on the track. We paid no taxes whatever on the right of way under the track.

Re-direct Examination.

We have never paid any tax on the real estate
396 under this particular track. We sometimes fail to pay taxes on property that belongs to us and some-

times we pay them on property that doesn't belong to us. When we don't pay taxes we should pay, the matter is called to our attention, but nobody says anything about it when we pay more than we should.

Re-cross Examination.

397 The representatives of the Edison Company did make a commitment to pay the license fees under the 1924 ordinance. They told me that they had undertaken to pay up to $700 a year, which was the estimated charge at that time. Later on when the ordinance was passed at $1400, we protested, but there was nothing we could do about it. There was a commitment by the Gas Company in connection with the Alton acceptance of this $1400 ordinance when I was in Mr. Cook's office, as I testified. Mr. Cook represented the Gas Company. I had
398 nothing to do with the ordinance charge made by the City on this track.

399 J. A. BEHRLE, a witness on behalf of petitioner, was sworn and testified:

Direct Examination.

My name is J. A. Behrle, and I am General Freight Agent of the Alton Railroad. I have been in the traffic department of the Alton and its predecessors for 32 years. I am familiar with the rates of the Alton and the application of those rates to the industries served by the track here involved. In the
400 case of rates on both state and interstate traffic, the tariff lists the Heldmaier Company, the Gas Company and the Moulding-Brownell Company as industries on the Alton Railroad. The tariff provides for

the application of Chicago rates to and from those industries. To cancel the rates maintained by the Alton on state and interstate traffic to and from the industries located on this track, it would only be necessary to eliminate the industries from the directory of industries in the tariff. It would only require the filing of a supplement to the tariff.

Cross Examination.

The industries I have mentioned have rates on all classes and commodities in state and interstate traffic. Those industries get the Chicago rate, which is the same as the rate to team tracks. We have team tracks at Harrison Street and Summit, and a substantial amount of carload traffic is delivered upon them. The Chicago rate also applies on team-track deliveries. Our team tracks at Harrison Street are only available to the Alton Railroad Company, and not to other railroads. A carload of coal could be unloaded at the Harrison Street tracks on the Chicago rate if the Alton received the linehaul to Chicago. We handle business to and from the industries, however, without considering the linehaul. If another railroad gets the linehaul we have to pay it. The Edison Company is shown as located on Alton rails at 25th Street and Mary Street, which seems to be a location on the track here in issue. The industries on the Alton Railroad in Chicago are listed in Tariff No. 22-Y, and, generally speaking, they all take the Chicago basis of rates. (Further hearing of case continued until April 6, 1936.)

Report of proceedings had April 6, 1936, on the adjourned hearing before the Illinois Commerce Commission in its Docket 24391, "Petition of The

Alton Railroad Company, etc." Appearances same as before.

411 Mr. Towner: At the last hearing reference was made to the standard side track contract of the Alton Railroad. If there is no objection I will offer a copy of the contract as an exhibit. (Said document
412 received in evidence, marked "Petitioner's Exhibit 19.")

There was also reference at the last hearing to the Final Decree in The Chicago and Alton Railroad Company receivership. I have had a copy made of part of that Decree showing the title, recitals and the paragraphs relating to the renunciation of contracts. I will offer that as Petitioner's Exhibit 20. (Said document received in evidence as "Petitioner's Exhibit 20.")

413 I also have a copy of order entered by Judge Wilkerson on March 22, 1935, in the Chicago and Alton receivership proceeding, extending the time of the Alton Railroad Company in which to renounce contracts up to July 18, 1936. (Said document offered and received in evidence, marked "Petitioner's Exhibit 21.")

418 I have had reproduced those pages of the Road Master's book which Mr. Cardy asked to have reproduced. I now hand him seven copies of those pages.
420 (Said document offered and received in evidence as "Respondent's Exhibit 1.")

421 JOHN T. CRAVEN, a witness on behalf of the Peoples Gas Light and Coke Company, was sworn and testified:

Direct Examination.

My name is John T. Craven. I am Chief Operating Engineer of the Peoples Gas Light and Coke Company. I have been connected with that Company for 25 years and am familiar with the switch track shown in yellow on Petitioner's Exhibit 1. The Gas Com-
422 pany has a plant on the lots marked 5, 6 and 7 in the subdivisions of blocks 3 and 4, as shown on that map. It is a distribution station. The Gas Company also has a plant on lot 5 in blocks 5 and 6, as shown on Petitioner's Exhibit 1. That plant is a storage holder. The Gas Company also has a plant located on lots 1 to 7 in blocks 7, 8 and 9, as shown on Peti-
423 tioner's Exhibit 1. That is a gas manufacturing plant which is not now operated. In years past this track was used extensively for supplying that plant with coal and coke. The traffic at that time averaged about 10 cars a day, but the operation decreased
424 around 1923. That plant is now used for standby and emergency operation. There has not been much traffic to or from it. It is expected to use the plant in the future, at which time the demand for railroad service will increase. The switch track here involved is necessary to the business of the Gas Company at
425 these various plants. There is very little service to the distribution plant now.

Cross Examination.

The Gas Company wants this switch track maintained at those plants so it can be operated when necessary. The portion of the track which lies in

lot 5 of blocks 5 and 6, and also that portion west of Loomis Street, as shown on Petitioner's Exhibit
426 1, is maintained by the Gas Company. I should say that that portion of the line west of the east line of Loomis Street is maintained by the Gas Company. The tracks shown in white on lots 5, 6 and 7 in blocks 3 and 4 are maintained by the Gas Company, but the line shown in yellow on those lots is maintained by the Alton. The Alton also maintains the track in yellow east of the west line of Loomis Street. The Gas Company is willing to maintain and stand a proportionate share of these tracks. We are wil-
427 ling to stand our share of the maintenance as between the Gas Company and the other industries served by the track. That offer applies to the tracks shown in yellow, as well as to the tracks shown in white. The Gas Company is also willing to pay its same proportion of the ordinance fees imposed by the City of Chicago for the crossing of these tracks over various streets and alleys. The Gas Company owns the track shown in yellow, a portion of which is located on property owned by the Gas Company. I am not sure just how much of the property on which it is located belongs to the Gas Company, but the
428 lots I have mentioned belong to the Gas Company. I do not know about the ownership of the track across the Edison Company property or the property of Moulding-Brownell or the Heldmaier Stone Company. The Gas Company paid for the construction of the track. It is my understanding that the Gas Company owns the lots which this track crosses from the point where it leaves Stark Street until it reaches Hillock Street. We are willing to
429 pay our proportionate part of the expense if the Railroad is not required to do it, but we would prefer to have the railroad required to do it. I do

430 not know the approximate length of track between Stark Street and Throop Street. Mr. Hoagland says it is about 1800 feet. The Gas Company has been operating the plant to which I refer for more than 25 years, and operated it up to 1923. The Alton served the plant over this track all that time. The
431 Alton also extended the track to various industries such as Moulding-Brownell and Heldmaier Stone. I know of no agreements between the Gas Company and the other industries when the track was extended. I am not sure that the Alton had the right to extend track to serve other industries. When I
432 say the Gas Company would stand its proportionate share of expense, I feel that is something the industries would work out among themselves.

433 M. R. HOAGLAND, a witness for petitioner, called for further cross examination, testified:

I think that the distance of this track from Stark Street to Throop Street is about 1700 or 1800 feet. That is from the connection at Stark Street to the easterly line of Throop Street. The track crosses
434 Stark Street and Mary Street and the alleys, or three streets and two alleys in all. The track shown in yellow on Exhibit 1 was not extended to serve the Heldmaier Stone Company, but was extended prior to the construction of that plant. That track was
435 extended through blocks 5 and 6 as early as 1885, but the Heldmaier track was not constructed until 1894. By the Heldmaier track I mean the white track extending in an arc from the yellow track in lot 1 in blocks 5 and 6. The part of the track colored yellow on Petitioner's Exhibit 1 was constructed

many years before. To reach over into the Haldmaier property, or Lot 1, would require an extension of about 600 feet beyond the spur serving lots
436 5, 6 and 7 in blocks 3 and 4. The first spur leading into the Moulding-Brownell Company would require about 100 feet of track, and the second would require 300 or 350 feet. In order to get into the Heldmaier and Moulding-Brownell plants from the spur leading off to the Gas plant, Throop Street would have to be crossed, in addition to those I have named.
437 It is about 600 feet or 650 feet from the Moulding-
439 Brownell spur to the west side of Loomis Street. Of the two spurs leading off the track shown in yellow on Exhibit 1 and serving the Moulding-Brownell Company, only one is covered by a contract. So far as I know, both tracks are being used. The white track extending off the yellow track on Exhibit 1 in lot 3 to the Moulding-Brownell Company is maintained by that Company from the point of clearance.
440 The Alton has maintained that track between the point of switch and the point of clearance. The Alton is also maintaining the track beyond the connection of the track shown in white on lot 3. On Exhibit 10 the Moulding-Brownell track is shown in green, and the Moulding-Brownell Company was
441 required to maintain it. The portion shown in red on that exhibit is maintained by the Alton. I don't know just how the Moulding-Brownell came into that contract, except as successor of the American Sand
442 and Gravel Company. I understand Moulding-Brownell is the successor of the American Sand and Gravel Company. In the case of the track serving the Heldmaier Company in lot 1, as shown on Exhibit 1, the Alton maintains the turn-out and any-
443 thing done on the Heldmaier property is paid by

that company. I think the tracks serving the Moulding-Brownell Company are maintained by the forces of that Company, as they constructed their own
446 tracks. I know what the main line of the Alton is and what the ordinary turn-out leading into an industry is. On Respondent's Exhibit 1 all tracks headed "Permanent Side Tracks" are shown on pages 180 to 192 and were owned by the Railroad.
447 That is a list of tracks existing in 1898, and many of them are no longer in existence. The Alton owns many tracks built to serve industries, but in almost all instances the cost of maintenance is borne by the industry. The contracts in effect with respect to
448 these tracks would control.

Re-direct Examination.

So far as I know, there is no agreement relating to the maintenance of the track serving the Heldmaier Stone Company. I think the track was built
449 in 1894. Our records show that the Heldmaier Company paid for it. The Railroad does not maintain the track shown in white on Petitioner's Exhibit 1, leading to the plant, but it does maintain the track from the point of switch to the point of clearance. We have many side tracks on the Railroad serving industries where the track not only belongs to the Railroad but is located entirely on its right of way.
450 Those tracks might be of substantial length. In other cases we build side tracks off our right of way under contract and retain ownership of the track and track material. In all those cases it is usual to enter into a side track agreement in the form of Petitioner's Exhibit 19, even though the track materials belong to the Railroad and the track is built

off the right of way. In those cases the provisions of the contract relating to maintenance, easements, etc., all apply.

J. L. HODGSON, a witness for Moulding-Brownell Company, was sworn and testified:

Direct Examination.

My name is J. L. Hodgson and I am Traffic Manager of the Moulding-Brownell Corporation. That Company is a producer and jobber of building material and coal. It owns a plant and property at 26th Street and Throop Street, as shown on Petitioner's Exhibit 1, and handles building material and coal at that point. I was formerly connected with the American Sand and Gravel Company, which was merged in the Moulding-Brownell Company. I was with it for 24 years and have been 5 years with Moulding-Brownell. The two companies were merged in 1930 and I became Traffic Manager of Moulding-Brownell. The approximate investment of Moulding-Brownell Company at the plant on Throop Street is $100,000. The plant has been operated since 1924, and is served by the Alton Railroad. The Moulding-Brownell plant has a spur track leading from the track shown in yellow on Petitioner's Exhibit 1, where loaded and empty cars are spotted. During the operation of the plant our Company has complied with the terms and conditions of the contract under which the track was built. Practically all of the traffic to that plant is inbound and consists of cement, clay tile, coal, gypsum tile, lime, plaster, sand and gravel. That is traffic coming to

Chicago for delivery at the plant. I have prepared
456 a statement showing the number of carload shipments received at that plant in 1933, 1934 and 1935. (Said document offered and received in evidence,
458 marked "Respondent's Exhibit 2.") The revenue received by the Alton, as shown on this Exhibit, is purely an estimate. The total for 1933 was approximately $37,000, for 1934 approximately $25,000, for 1935 close to $27,000. We maintain our
459 own track. We have no rail service at this plant, except that given by the Alton over the track shown in yellow on Petitioner's Exhibit 1. I understand
460 the movement at the Heldmaier plans is approximately 100 cars per year. That plant is adjacent to that of the Moulding-Brownell Company and there is a switch track extending into it from the track shown in yellow on Petitioner's Exhibit 1. I would
461 say there are 40 or 50 retail sand and gravel plants in the Chicago switching district with which our Company competes. Generally speaking, the same
462 rate applies on traffic to all of those industries from the various coal fields in Illinois and Indiana. Most of those rates are not increased by any charge in the Chicago switching district, but some of them have an arbitrary added to the Chicago rate. Our
463 plant has published tariff rates for inbound and outbound movements. We have about 8 to 15 cars a day into the plant, principally coal. That coal is locally distributed in the neighborhood. Subsequent
464 to the hearing in the case involving the complaint of the Moulding-Brownell Company a proposition was made by the Alton Railroad Company to the shippers with reference to the maintenance of the track shown in yellow on Petitioner's Exhibit 1. That was about six months ago. I have a letter from

465 the attorneys of the Alton Railroad Company relating to this matter. (Said document offered and received in evidence, marked "Respondent's Exhibit 3.") That exhibit is a copy of a letter dated July 8, 1935, written by Mr. Cardy and addressed to the attorney for the Railroad Company at Chicago.

Mr. Towner: I object to the exhibit, on the ground it is self serving and immaterial.

468 *Cross Examination.*

It is worth something to the Moulding-Brownell Company to keep the present service over the track
469 here involved. I cannot say whether we are willing to pay any maintenance charges on the track shown in yellow on Petitioner's Exhibit 1 without talking to my superior officers. I do not know what their attitude would be if given to understand that the railroad service would cease. I do not know what they
470 would do. I take it, however, we are willing to participate in the payment of the ordinance fee. I do not know whether or not Petitioner's Exhibit 12 was
471 executed by the Alton. I have no knowledge of that and have no executed copy of the agreement. The Alton revenue shown on Respondent's Exhibit 2 is merely an estimate. I have no knowledge of the division of rates, but I assumed that the Alton received
472 30¢ a ton. That is switching revenue and not a division of the line haul rate. That is true of practically all of those figures. The coal shown on the exhibit comes from various points, some of which are in central Illinois. The Alton has a line from central Illinois to Chicago, and if it hauled the coal from central Illinois, its revenue would be more
473 than $15. Most of this coal came in over the Illinois

Central from the southern part of the State, so that the fact is the Alton maintains a switch track to make delivery of coal hauled to Chicago by other railroads. The Alton gets no line haul on the coal, but it does on some of the other commodities. It
474 gets some cement, coming from LaSalle at Joliet, and some gypsum tile at Peoria. On the cement I have estimated 40¢ a ton, that being my estimate of the Alton division from Joliet. All the balance of the charges shown are switching charges. The Alton
475 would get more than the $9.00 a car shown on gypsum tile if it hauled from Peoria, but I think practically everything is on a switching charge. With very few exceptions, the Alton is maintaining the terminal for the benefit of the roads getting the line haul rates. Coal is quite an important commodity to our Company. We compete with all distributors
476 of coal in Chicago, including John Bigane. He is a coal distributor with whom we compete.

Re-direct Examination.

All of the coal moving to Chicago comes on a through rate from the mines, and out of that through rate the railroad delivering the cars to the industry gets a proportion of the through rate which I have
477 estimated. I estimated the Alton's line-haul revenue on cement at 40¢ a ton. The Illinois Central has its tracks near to this particular track in question, but does not reach our plant. The whole thing is done under the published tariff rates, but the Illinois Cen-
478 tral does not use that track. Its track is on the other side of the Alton main line and it has no connection to handle carload freight to the tracks here involved.

479 M. R. HOAGLAND, a witness for petitioner, was recalled and testified:

Direct Examination.

I am familiar with the Vilija Company. It is a coal company located in Chicago and is served by
480 the Alton Railroad. It receives coal at its plant and thereafter distributes it. It is served by a side track extending from the main line of the Alton to its plant at Spaulding Avenue. The Vilija Company pays the entire cost of maintaining that track, some of which is located off the right of way of the Alton. It even maintains that part of the track on the Alton right of way. The track does not cross any public streets or alleys.

481 *Cross Examination.*

The bins of the Vilija Company are about 80 feet from the Alton main line. The agreement between the Alton and the Vilija Company is substantially the same as our standard industrial agree-
482 ment. There is no agreement between the Moulding-Brownell Company and the Alton, but there is an agreement with the American Sand and Gravel Company. The maintenance provisions of that agreement are in line with our standard practice. The Vilija Company agreement is different in that that company maintains all of the track.

483 *Re-direct Examination.*

The Alton also serves in the Chicago district the John Bigane Coal Company, the F. A. Wood Coal Company and the F. A. Wood Company, which is a

tenant of the General Cullet Company. Those are coal yards. Bigane bears the entire expense of maintaining its track and the Wood Company bears the expense of maintaining their track up to the
484 point of clearance. In all these cases the industry procured the right of way for the construction and operation of track, including the rights across public streets and alleys. One of these tracks crosses Albany Avenue and a crossing of the street is main-
485 tained. The matter of getting the ordinance to cross that street was a matter for the industry, which obligated itself to pay the rental and the maintenance of the track.

Examiner Daley: Does that conclude the matter?

Mr. Towner: Yes.

488 Examiner Daley: It is understood that the briefs in this matter shall be filed on or before May 4th. Let the record show that the case is marked heard and taken, briefs to be filed by May 4, 1936.

490 Brief on behalf of Alton Railroad Company filed with the Illinois Commerce Commission in its Docket 24391 on April 18, 1936.

492 Brief on behalf of Peoples Gas Light & Coke Co. filed with the Illinois Commerce Commission in its Docket 24391 on May 9, 1936.

494 Brief on behalf of Moulding-Brownell Co. and Heldmaier Stone Co., filed with the Illinois Commerce Commission in its Docket 24391, on May 11, 1936.

508 Statement on behalf of Commonwealth Edison Co., filed with the Illinois Commerce Commission in its Docket 24391, on May 13, 1936.

512 Order entered May 15, 1936, setting case for oral argument on May 27, 1936.

513 Reply brief on behalf of Alton Railroad Co., filed with the Illinois Commerce Commission in its Docket 24391, on May 22, 1936.

514 Case argued orally before the Commission May 27, 1936, and taken under advisement.

515 Petitioner's Exhibit 2, Docket 24391, being copy of agreement dated November 15, 1900, between The Chicago and Alton Railway Company and Peoples Gas Light and Coke Company. Recites construction and previous operation of switch tracks here involved, extending from railroad of the Railway Companyand terminating in Lot 3 of Block 8, in Canal Trustees' Subdivision, as shown on blueprint attached to agreement; that Gas Company is owner of said Lot 3 and Lots 4 and 5 in Block 8 and is the lessee of Lot 6 in Block 8, and has requested the Railway to extend said switch track as shown in red on said blueprint. Railway agrees to construct the extension shown in red upon said blueprint, and Gas Company agrees to refund to the Railway the cost thereof, if the Railway shall at any time thereafter be prevented from using the switch track. Gas Company agrees to join with Railway Company in making application to the City of Chicago for vacation of Mary Street, upon the request of the Railway.

516 Petitioner's Exhibit 3, Docket 24391, being copy of ordinance passed by the City Council of Chicago on November 2, 1903. Ordinance recites the existence for many years of switch track here involved, built on private property and extending from

a point on Lot 32 of sub-lot 1 in Maher's Subdivision of Lots 1 and 4, Block 22, in Canal Trustees' Subdivision of south fractional Section 29, Township 39 North, Range 14, East of the Third Principal Meridian, to a point in Lot 6 in the subdivision of Blocks 7, 8 and 9 in Canal Trustees' Subdivision of south fractional Section 29, Township 39 North, Range 14, extending at grade across intervening streets and alleys, and the necessity of elevating part of said switch track in order to maintain its existing connection with the main line of
517 the Railroad Company. Ordinance requires the Railroad Company to partly elevate the switch track from its connection with the track of the Railroad Company to a point 100 feet east of the west line of Lot 3 in the subdivision of Blocks 3 and 4; to continue thence on a descending grade and cross Throop Street, Loomis Street and Cologne Street at grade. Also requires elevation upon steel, iron
518 or wooden trestles over the streets, and subways beneath the track where it extends over Mary Street and Hillock Avenue, and prescribes specifications
519 for such subways. Also requires that work of elevating track be commenced before May 1, 1904, and be completed before December 31, 1904; and provides that rights and privileges granted by the ordinance shall cease in twenty years with respect to the elevated portion of track, and shall cease at the end of ten years with respect to the unelevated portion of track. Also requires Railroad to keep Throop Street and Loomis Street at point of crossing in good repair, to pay to the City of Chicago annually the sum of $300 during each year of the life of the ordinance, beginning January 1, 1904, and limits use of track across Throop and Loomis

520 Streets to hours between 2 A. M. and 4 A. M. and 2 P. M. and 4 P. M., not more than three trains to pass over the track during the designated hours, at a maximum speed of 10 miles an hour.

521 Petitioner's Exhibit 4, Docket 24391, being copy of agreement dated November 1, 1904, between Chicago and Alton Railway Company, Peoples Gas Light and Coke Company and Commonwealth Electric Company. Recites passage of ordinance of City of Chicago November 2, 1903 (Pet. Ex. 3), requiring elevation of switch track here involved, the track being shown upon blueprint attached to the contract; that the ordinance was obtained by The Chicago and Alton Railroad Company at the instance of and for the benefit of the Gas Company and the Electric Company, which own nearly all of the land upon which the track is located, and that the Railroad Company has assigned all rights and privileges under the ordinance to the Gas Company and Electric Company; that the Gas and Electric Companies desire the work of elevating the track to be done by the Railway Company, and that it be thereafter maintained by the Railway Company. Agreement provides that Railway Company shall furnish the necessary material and labor and elevate the tracks in accordance with the ordinance
522 requirements; that the Railway Company shall construct, upon request of the Electric Company, a spur track starting at a point on the switch track about 100 feet east of the west line of Lot 3 and running east about 300 feet parallel to Cologne Street, as shown in blue upon the blueprint; that the Electric Company reserves the right to change the construction of the spur track to be built, from

embankment to timber trestle; that upon the elevation of the track at an estimated cost of $37,090.00 the Gas Company and Electric Company shall each pay to the Railway Company one-half of that cost;
523 that for 5 years from and after January 1, 1905, and thereafter until terminated upon one year's notice, the Railway Company shall be permitted the sole use of the switch track for the purpose of handling the business of the Gas and Electric Companies, and that of such other industries as may be located upon the track; that the Gas Company will use its best efforts to procure the right to maintain the track upon property not owned by it or the Electric Company; that during said 5 year period and so long thereafter as the Railway Company shall be permitted to solely use and operate the switch track, it will maintain, renew and repair it, and shall pay all expenses arising from its use and operation; that nothing in the contract shall require the Railway Company to carry out any requirements contained in future ordinances of the City of Chicago; that the Railway Company
524 shall handle all inbound and outbound shipments of the Gas Company or Electric Company; that the Gas Company and Electric Company assume and agree to carry out all obligations of The Chicago and Alton Railroad Company and the Railway Company to the City of Chicago under the ordinance of November 2, 1903, including the obligation to make the annual payment to the City of Chicago, and that the agreement shall be binding upon the successors and assigns of the parties.

525 Petitioner's Exhibit 5, Docket 24391, being blueprint attached as "Exhibit 1" to Petitioner's Ex-

hibit 4, agreement dated November 1, 1904, showing the track involved in yellow, red and green.

526 Petitioner's Exhibit 6, Docket 24391, being copy of assignment dated November 1, 1904, by Chicago and Alton Railroad Company and Chicago and Alton Railway Company to Commonwealth Electric Company and Peoples Gas Light and Coke Company, of all rights, privileges, permissions and benefits granted to The Chicago and Alton Railroad Company by ordinance of the City Council of the City of Chicago passed November 2, 1903 (Pet. Ex. 3), and relating to the elevation of the switch track here involved.

527 Petitioner's Exhibit 7, Docket 24391, being copy of agreement dated December 1, 1907, between Chicago and Alton Railroad Company and the Commonwealth Edison Company. Recites succession of Chicago and Alton Railroad Company to Chicago and Alton Railway Company and Commonwealth Edison Company to Commonwealth Electric Company; partial elevation of track here involved under agreement dated November 1, 1904 (Pet. Ex. 4); and desire of Edison Company that Railroad Company extend the trestle at the southwest corner of Lot 4 in Blocks 3 and 4 of Canal Trustees' Subdivision of Section 29, Township 39 North, Range 14, East of the Third Principal Meridian, in order to provide for the construction of a subway under the switch track. The agreement provides that the Railroad shall do all the work and furnish the material necessary to extend the trestle, the location of the extension being shown in red upon a blueprint at-
528 tached to the agreement; that the Edison Company shall pay the cost of said work and remove so much

of the existing embankment as may be necessary for the construction of the subway, and maintain the trestle at its own expense; that the Edison Company will release the Railroad Company from all claims for loss or damage occasioned by the extension, and that the agreement shall not affect the rights and liabilities of the parties under the prior agreement of November 1, 1904 (Pet. Ex. 3).

529 Petitioner's Exhibit 8, Docket 24391, being blueprint attached to agreement of December 1, 1907 (Pet. Ex. 7), showing proposed extension in red.

530 Petitioner's Exhibit 9, Docket 24391, being copy of agreement dated April 5, 1924, between William W. Wheelock and William G. Bierd, as Receivers of the property of The Chicago and Alton Railroad Company and American Sand and Gravel Company. Recites desire of Gravel Company to have the Receivers construct a switch track as shown by blueprint attached to the agreement. Agreement provides that Receivers will construct the switch track; that the Gravel Company grants easement to the Receivers for the construction, maintenance, operation and repair of the portion of track located upon the premises of the Gravel Company, and will secure to the Receivers the right to construct, maintain and operate the track on property not owned by the Gravel Company; that the Receivers will furnish the material and construct the track from point of switch to clearance point, as shown in red on blueprint, at the expense of the Gravel Company; that the Gravel Company will furnish the material and construct the track beyond the point of clearance, as shown in green on the blueprint;
531 that the Receivers will refund the cost of the track

from point of switch to point of clearance, at rate of $2.00 per car on all shipments on which the revenue is $15 per car or more; that the part of switch track shown in red shall be owned and maintained by the Receivers, and that the part shown in green shall be owned and maintained by the Gravel Company; that the Receivers shall have the right to ex-
532 tend the track to serve other industries; and that agreement may be terminated by either party on 90 days' notice.

534 Petitioner's Exhibit 10, Docket 24391, being blueprint attached to contract dated April 5, 1924 (Pet. Ex. 9) showing projected track in red and green.

536 Petitioner's Exhibit 11, Docket 24391, being copy of ordinance passed by the City Council of the City of Chicago on December 10, 1924. Authorizes Chicago and Alton Railroad Company to maintain and use the switch track here involved as then constructed
537 for a period of 20 years following November 2, 1923, the Railroad to keep the streets under the track in good condition and pay to the City of Chicago compensation in the amount of $1400 per year, beginning November 2, 1923. Further provides that if default be made in the payments, the privileges granted by the ordinance may be revoked or the ordinance repealed; that the grantee shall execute a bond to the City of Chicago for $10,000, conditioned upon the faithful observance and perform-
538 ance of the provisions of the ordinance; that if the bond is not kept in full force, the privileges granted by the ordinance shall cease; and that the ordinance shall be in effect from and after its passage, if a written acceptance is filed with the City Clerk within 60 days thereafter.

539 Petitioner's Exhibit 12, Docket 24391, being copy of agreement dated April 7, 1932, between The Alton Railroad Company and Moulding-Brownell Corporation. Recites desire of Moulding-Brownell to have the Railroad construct a switch track as shown in red upon blueprint attached to contract. Agreement provides that the Railroad shall furnish the materials for and construct and maintain the track from point of switch to the heel of the frog, at the expense of the Moulding-Brownell Company, and that Moulding-Brownell Company shall furnish the materials and construct and maintain the remainder of the switch track at its own expense; that Moulding-Brownell grants easement to the Railroad Company for the repair, maintenance, operation and use of said switch track; that the ownership of the track between point of switch and heel of frog shall be with the Railroad, and ownership of balance of track shall be with Moulding-Brownell; that Mould-
540 ing-Brownell will indemnify the Railroad against various liabilities; that agreement shall be binding on successors and assigns of parties, and may be terminated by either party on 90 days' notice.

541 Petitioner's Exhibit 13, Docket 24391, being blueprint attached to Petitioner's Exhibit 12, Contract of April 7, 1932, showing track to be constructed in red.

542 Petitioner's Exhibit 14, Docket 24391, being copy of ordinance of the City Council of the City of Chicago passed May 9, 1934, reducing compensation for maintenance of track here involved from $1400 a year, as fixed by ordinance passed December 1[illegible], 1924, (Pet. Ex. 11) to $700 a year, beginning November 2, 1932.

543 Petitioner's Exhibit 15, Docket 24391, being copy of election of The Alton Railroad Company, dated March 26, 1936, not to assume agreement dated November 1, 1904, between The Chicago and Alton Railway Company, the Peoples Gas Light and Coke Company and Commonwealth Electric Company; said election being entitled in the case of "*The Texas Company, et al., Complainants* v. *The Chicago and Alton Railroad Company, et al., Defendants*, In Equity, Consolidated Cause No. 2940." in the District Court of the United States, for the Northern District of Illinois, Eastern Division.

546 Petitioner's Exhibit 16, Docket 24391, consisting of copies of letters relating to track here involved. Letter dated February 15, 1910, from Vice-President of Edison Company to Chief Engineer of Chicago and Alton Railroad Company, advises that operating agreement can only be terminated on one year's notice from Edison Company or Gas Company, and that Gas Company has no development in mind that would permit it to terminate agreement. Letter
547 dated February 7, 1910, from Chief Engineer of Edison Company to Chief Engineer of Chicago and Alton Railroad Company, advises that he will take up with his officials request of Railroad Company for continuation of right to use the track here in-
548 volved for the future. Letter dated January 26, 1910, from Chief Engineer of Railroad Company to Chief Engineer of Edison Company, calls attention to fact that exclusive operating rights of Railroad over track involved ended January 1, 1910, subject to termination thereafter upon notice, and requests assurance of right to operate over track for term of years.

549 Petitioner's Exhibit 17, being copy of letter dated January 31, 1911, to Chief Engineer of Chicago and Alton Railroad Company from James A. Hair, representing private owners, complaining that Edison Company and Gas Company decline to sign contract providing for switching over track involved for other industries, unless they are paid $12,000, and states that property owners decline to pay the $12,000.

551 Petitioner's Exhibit 18, Docket 24391, being statement of maintenance costs on track here involved. Shows running repairs, including material and labor, as $998 per year; and reconstruction costs, including relay of rail for 3 years, reconstruction of steel bridges for 18 years and reconstruction of trestles for 3 years as $3,912; together with taxes of $383 per year.

552 Petitioner's Exhibit 19, Docket 24391, being form of standard industry track agreement used by The Alton Railroad Company. Under this agreement, provision is made for the ownership of the track, as the case may be; the industry grants the railroad an easement for the construction, maintenance, operation and repair of the track upon the industry's property, and undertakes to secure for the railroad the right to maintain the track upon property
553 of third parties; the railroad agrees to maintain the track and the industry agrees to make payment therefor; the railroad has full control of the track and the right to use it for general purposes, and also the right to extend it to other industries; the industry agrees to comply with the rules of the rail-
554 road and all requirements at law, etc., with respect to clearances and the use of the track; the industry agrees to indemnify the railroad against claims

555 for loss by fire and all loss, damage or injury, except that resulting from negligence of the railroad; the industry has no right to assign the agreement without the consent of the railroad and it is binding upon the successors, assigns, etc., of both parties. The agreement is terminable by either party upon sixty days' notice to the other party, and terminates in any case if the railroad loses the right of opera-
556 tion over the track; and upon such termination, the railroad has the right to remove such part of the track as is owned by it.

557 Petitioner's Exhibit 20, being extracts from Final Decree of Foreclosure and Sale entered in the case of *"The Texas Company, et al.* v. *The Chicago and Alton Railroad Company, et al.*, Consolidated Cause No. 2940," pending in the District Court of the United States, for the Northern District of Illinois, Eastern Division. The Decree recites that The Chicago and Alton Railroad
558 Company was formed in 1906 and operates certain lines of railroad in Illiniois; that any purchaser of
559 its property, as described in the Decree, shall have the right, within one year after delivery of a deed therefor, to elect not to assume or adopt any lease, traffic, trackage, terminal, crossing or operating agreement or other contract, not fully performed, which was made by The Chicago and Alton Railroad Company; that such election shall be made by instrument in writing, signed by the purchaser of such properties and containing a general description of the contract which it is elected not to assume, such election to be filed with the Clerk of the Court. The Decree further provides that no user of rights shall preclude such a purchaser in respect of such election.

560 Petitioner's Exhibit 21, Docket 24391, being copy of order entered in the case of "*The Texas Company, et al.* v. *The Chicago and Alton Railroad Company, et al.*, Consolidated Cause No. 2940," in the District Court of the United States, for the Northern District of Illinois, Eastern Division. The order extends to July 18, 1936, the time of The Alton Railroad Company, the successor in interest of the purchasers of the property of The Chicago and Alton Railroad Company, to elect not to assume or adopt contracts, agreements, etc., of The Chicago and Alton Railroad Company.

561 Respondent's Exhibit 1, Docket 24391, consisting of 18 sheets, listing various side tracks of The Chicago and Alton Railroad Company, as permanent side tracks, temporary side tracks or private side tracks. The lead to the Cologne Street track (the
576 track here involved) is shown as a permanent side track 150 feet long; the Cologne Street main track (the track here involved) is shown as a private side track 3537 feet long.

579 Respondent's Exhibit 2, Docket 24391, being statement of shipments received by Moulding-Brownell Corporation at Eleanor and Loomis Streets Yard during 1933, 1934 and 1935; shows 2383 cars received in 1933; 1657 cars received in 1934; and 1757 cars received in 1935. The estimated Alton revenue on these cars is shown as $37,243 in 1933, $25,124 in 1934 and $26,612 in 1935.

580 Respondent's Exhibit 3, Docket 24391, being copy of letter dated July 8, 1935, addressed to Guy Gladson, 38 South Dearborn Street, Chicago, Illinois. The letter is unsigned, but states that the writer is in receipt of a letter from the Moulding-Brownell

Corporation, saying that a division of the franchise tax to the City on the C. & A. track is agreeable to it. The division is stated as being C. & A. $100, Moulding-Brownell Corporation $200, Gas Company $300, Heldmaier $100. The letter suggests that the agreement be made effective January 1, 1935.

583 Copy of order of Illinois Commerce Commission made on October 28, 1936, in its Dockets 24391 and 22201, Consolidated.

594 Copy of order mailed to all parties of record on October 30, 1936. Petition of The Alton Railroad Company for rehearing filed November 28, 1936.

595 Copy of petition of The Alton Railroad Company for rehearing, filed with Illinois Commerce Commission on November 28, 1936, in its Dockets 24391 and 22201, Consolidated.

596 Order entered December 9, 1936, by Illinois Commerce Commission granting rehearing. Order entered December 11, 1936, setting case for further hearing on January 12, 1937.

597 Notice of filing of copy of reply of Peoples Gas Light and Coke Company to petition of The Alton Railroad Company for rehearing in Dockets 24391 and 22201, Consolidated, on December 21, 1936.

599 Copy of reply of the Peoples Gas Light and Coke Company to petition of The Alton Railroad Company for rehearing, filed with Illinois Commerce Commission, on December 22, 1936, in its Docket 24391.

600 Consolidated cases 22201 and 24391 before Illinois Commerce Commission called for hearing on January 12, 1937.

601 Report of proceedings had January 12, 1937, on the hearing before the Illinois Commerce Commission in its Dockets 22201 and 24391. Appearances same as before.

605 Mr. Henry: I understand that a petition for rehearing in this case has been granted and this proceeding is resumed pursuant to the petition for rehearing. I suggest that The Alton Railroad Company proceed.

606 M. R. HOAGLAND, a witness on behalf of The Alton Railroad Company, testified:

Direct Examination.

My name is M. R. Hoagland. I am an engineer for The Alton Railroad Company and am the same Mr. Hoagland who testified at the previous hearings The Alton Railroad Company has not paid to the City of Chicago the $700 license fee fixed by the ordinance covering the track here involved. The
607 payment was due on November 1st, last. The bond required under that ordinance has also been cancelled by The Alton Railroad Company. The track involved is in bad condition and the Moulding-
608 Brownell Company has asked us to put it in better condition. A large portion of the track is in need of relaying with rail. It is now laid with 80-pound rail, but when the rail is relaid it will be done with 90-pound rail. That additional weight of rail, under the rules of the Interstate Commerce Commission,
609 is considered as an addition to the property. The ten additional pounds of rail will be charged to additions and betterments, and the 80 pounds will

be charged to maintenance. If the track belonged to us, that additional weight of rail, amounting to 10 pounds, would be included in the value of the property of the Railroad Company. The trestle also is in need of relaying. It is of untreated timber and that timber is in a decayed condition. Our
610 practice would be to rebuild it with creosoted timber. The heavier weight of rail is now used by the railroad to eliminate danger and maintenance cost and would be necessary from both standpoints. Both
611 in connection with the rail relaying and in connection with the trestle reconstruction there would be some part of the cost which, under the accounting rules prescribed by the Interstate Commerce Commission, would be charged to additions and betterments, and would be added to the value of the railroad property, if the track belonged to it. That is
612 the part of the cost that we are supposed to capitalize. Also, the track leading to the Moulding-Brownell Company is partially blocked due to the unloading of material by that company. I am talking about
613 the main lead. The track now lies practically in a trench and catches a lot of water. In the future
614 it will be necessary to pick the track up and put in enough ballast so that the track will not be fouled. That additional ballast would also go into the addi-
615 tions and betterments account. At least the cost of acquiring the ballast and hauling it there would go into that account, if the track belonged to the Alton. The steel bridge over Hillock Street also needs work. The bridge is a steel girder span and the ballast is carried on plank flooring. The re-
616 placing of that timber flooring would cause a charge to additions and betterments, if the track belonged to the Alton, as the plank there now would be re-

placed with creosoted timber. The Alton Railroad has other spur or side tracks in Illinois similar to the track here involved, with spurs leading off them
617 and serving industries. We have a track on the east side of Halsted Street in Chicago with six tracks running off it to industries. The track is
618 similar in every respect to the one here involved. At Wann, Illinois, we have a switch track serving the Standard Oil Company, and off it are three spurs serving three other industries. At Springfield also we have a spur leading off our main track, and
619 serving five industries with a number of spurs. At Carlinville and Coal City we also have switch tracks with a number of spurs leading off them to serve industries. All these switch tracks are about comparable in length with the track here involved. The word spur is the common expression for tracks leaving the main track and extending out of other tracks.
620 I would designate all of these tracks, including the one here involved, as being spur or side tracks. It
621 is the common practice to call them that. I have been connected with the railroad since about 1909.
622 I only know what our records show with respect to the location of the Heldmaier Company and the Moulding-Brownell Company on the track here
623 involved. Our records show nothing on this point. We find no record of any industries being located on this track by The Alton Railroad or its predecessors, although it has had applications from industries for locations on this track. Thomas McGuane
624 & Company made application for such a location.
625 We advised them to get in touch with the Gas Company for permission to get service on the track. The question of the Alton's right to operate this track to serve industries other than the Gas Com-

pany came up in 1909, when we were attempting to
626 locate the Sun Oil Company on the track. There was such uncertainty in the minds of the management that the proposition was given up and the industry located elsewhere. At that time the matter was taken up with the Gas Company by the Alton. My sources of information are the official records of
627 the Alton in the Chief Engineer's office. I have
628 copies of those letters and documents with me. They are exact copies of the documents in the original files of the Alton with respect to this subject matter, and I had the copies made myself. (Said docu-
629 ments offered in evidence as Alton Railroad Company Exhibit No. 1 of January 12, 1937.)

Mr. Dines: We object to the offer.

630 The Witness: The matter of locating the Sun Oil Company on that track is discussed in this cor-
631 respondence, and I am able to say what the position of the Gas Company was on the matter. The matter was handled between the Real Estate Engineer of The Chicago and Alton Railroad and the Superintendent of the Gas Company, and perhaps others.

Mr. Cardy: We object.

Mr. Dines: We object.

632 The Witness: I was connected with the railroad in 1909 and know that George H. Ross was Executive Vice-President at that time and that W. H. Ross was Vice-President in charge of freight traf-
633 fic, and C. M. Larson was Real Estate Engineer. W. D. Taylor was also Chief Engineer, under whom I worked. The outcome of the matter was that

the Sun Oil Company located elsewhere, due to the fact that the Gas Company and the Edison Company insisted on a payment of $12,000 to allow outside industries to be served over the track.

634 *Cross Examination.*

If we were changing our main line from 80 to 90-pound rail, we would allocate the charge to various accounts, just as I said we would do in the case of this track, if the Alton owned it. My testimony
635 with respect to the condition of the track here involved did not relate to the spur tracks of the Moulding-Brownell Company, but the business of that Company moves over these tracks and over the trestle in question. There were some obstructions on the property of the Moulding-Brownell Company to interfere with the operation of their spur track when I was out there to inspect the track. I re-
636 ported the matter back to our office. The letter to Mr. Kemp dated in December, 1910, and contained in my Exhibit 1 of this date, stated that we desired to have a track in order that we might establish industries on the vacant lots south of Throop Street.
637 Those lots are the ones now occupied by Moulding-Brownell. This was not done to serve Moulding-Brownell or the American Sand and Gravel Company, as the latter Company did not locate there until fourteen years afterwards. Our records do
638 not show how the American Sand and Gravel Company got in there, or whether they went to the Gas Company. I did not produce at the last hearing a contract covering operation of the spur track serv-
639 ing Moulding-Brownell. The contract is dated in 1924—fourteen years after this other matter arose,

when the Edison Company and Gas Company attempted to get $12,000. I don't know under what conditions the American Sand and Gravel Company located there originally. I don't know whether we
640 secured permission for any industries to locate on this track. We always put the matter up to the industry itself to get permission from the Gas Company. So far as I know, we did not get authority from the Gas Company in 1924 to operate over this track to serve the American Sand and Gravel
641 Company. I formerly testified that the Alton had constructed a turnout for the track beginning in lot 4 as shown on Exhibit 5 and extending down toward the River in lots 5 and 6. I then testified that the Alton did pay for the extension of the track
642 into lot 6, and that from a point in lot 4 down into lot 6 our records showed that the Alton paid and that our ownership of that part of the track was not questioned. We were asked to extend that track by the Gas Company, and we now own that portion of it beginning in lot 4 of the subdivision of blocks 7, 8 and 9 to the stub end of the track adjacent to
643 the River bank. From my investigation I know that the ownership of that portion of the track is in the Alton and that the Alton paid for constructing it. I said that the Gas Company asked us to
644 make the extension. It was done for that Company, and yet the Alton owns and paid for the construction. To get to that piece of track we have to run over the rest of the track. The Gas Company formerly permitted an asphalt company to have service over that track, but I think that company
645 is there no longer. The Gas Company is the only company now served by that extension. The letter of September 17, 1910, contained in my Exhibit 1

of today, addressed to W. J. Knapp, was from C. M.
646 Larson, the Real Estate Engineer of the Railroad. That is the only letter purporting to be between the Gas Company and the Alton. I don't know that the copies of the others were ever sent to the Gas Company. I wanted to show by these letters the uncertainty that existed in the minds of the man-
647 agement of the railroad. The letter of Mr. Hair to W. D. Taylor, Chief Engineer of the Railroad, on January 31, 1911, should be considered, as it reflected dealings with the Gas Company. It is not, however, between the Gas Company and any other party.

648 Mr. Dines: We object to all of the letters designated as Exhibit 1 as of today, except the letter of September 17, 1910.

Mr. Henry: I think we will admit the letters for what they purport to be.

649 (Said document so offered as Alton Railroad Company Exhibit 1 of January 12, 1937, received in evidence.)

The Witness: A shipper did apply to the Alton for service over this track, the application coming through the Thomas McGuane Company. We told them they would have to get permission from the
650 Gas Company. That occurred after the prior hearings in this case had ended and while the matter was pending before the Commission, but it reflects the past practice of the railroad. In 1931 we told the American Barrel Company to get permission from the Gas Company if they wanted service on this track. The Gas Company ordinarily handled matters in connection with the track. The Ameri-

651 can Barrel Company reported back that they had secured permission, but the McGuane Company had
652 no dealings with me. I don't know what the Gas Company told them. I am familiar with the con-
654 tract of 1904. I knew there was a provision in that contract which, until it expired, gave the railroad the right to handle freight business of other industries besides the Gas Company and Edison Company over that track, but there is a 12-month notice that voids the provision after five years. I men-
655 tioned a number of other tracks approximately the same length of this track located in Illinois. I recall that one was constructed under a contract which required the industries to maintain the lead track
656 which served them. That is the one south of Springfield. In every instance the tracks lie on property of the Railroad Company and are owned by the Railroad. In the case of the track involved in this case the Alton owns the track to its right of way line. In the case of the track at Springfield, it is built on our property and we own the track and the
657 spurs leading off it to the right of way line. Beyond that, the industries own the spurs. In the case of
658 the Springfield track, it is about one-half mile long, all on our right of way. The whole spur is owned by the Alton until you get to the spurs leading into the industries. That is also true of the other tracks
659 which I mentioned. The main lead to the industries is on the Alton right of way. The track at Springfield, the track at Wann and the track at Halsted Street all cross public highways, but belong
660 to the Alton. The railroad does not maintain all of the tracks extending to the industries. We maintain the switching lead to the industries. Generally speaking, the railroad maintains the track owned

by it, but the general practice is for the industry to maintain that portion of the track on our right of way beyond the point of clearance and also the part of the track on its own property. I am familiar
661 with the spur of The Alton Railroad Company south of Lincoln and serving the Lincoln Sand and Gravel Company. The turn-out of that track and a portion of the track up to the right of way line is owned by the railroad, but outside the right of
662 way the ownership of the Gravel Company begins. Beyond the edge of our right of way the property is owned by people other than the railroad company. I think the track is about a mile or a mile and a half long, but I don't know that it crosses any public highway. I have never had to go down there.

663 Mr. Towner: That is all for us, Mr. Examiner.

Mr. Dines: We may have evidence to offer, but a two or three-day continuance will be sufficient.

664 The Examiner: The case will be continued until January 14, 1937.

665 Consolidated cases 22201 and 24391 called for hearing on January 14, 1937, and continued until January 27, 1937. Request made for oral argument on that date.

666 Report of proceedings had January 14, 1937, on the hearing before the Illinois Commerce Commission in its Dockets 22201 and 24391 Consolidated. Appearances same as before.

668 The Examiner: I understand The Alton Railroad Company has some additional evidence to present today.

669 Mr. Dines: We did not know the case was coming up for evidence today. I ask that the matter be continued until Mr. Cardy can be here.

670 The Examiner: We will hear the evidence and if Mr. Cardy wishes to cross-examine he will be given an opportunity later on.

Mr. Towner: Before going ahead I wish to make a statement with respect to the evidence. Petitioner's Exhibit 1, the blueprint attached to the petition, shows that part of this track west of Loomis
671 Street, particularly that part in lots 4, 5 and 6 of blocks 7, 8 and 9, is extended in a straight line. That end of the track was constructed under a contract in evidence as Petitioner's Exhibit 2, and the maps put in with that exhibit show that end of the track as constructed in a curve to the River. I wish Mr. Hoagland to testify on this matter.

672 M. R. HOAGLAND, called as a witness on behalf of The Alton Railroad Company, testified:

Direct Examination.

I am the same Mr. Hoagland who has testified before in this case. That part of the track here involved lying in lots 4, 5 and 6 of blocks 7, 8 and 9 was constructed under an agreement between The Chicago and Alton Railroad Company and the Gas Company dated November 13, 1900, and introduced in evidence as Petitioner's Exhibit 2. Petitioner's
673 Exhibit 5 shows the manner in which the tracks were built. I have testified that the track was not built on a curve to the River, as shown on Petitioner's

Exhibit 5, but I have since found that the tracks did extend down to the River, as shown on Exhibit 5. My previous statement that the track was constructed through these particular lots in a straight line,
674 as shown on Exhibit 1, is in error. At the present time the tracks lie in a straight line, as shown by Exhibit 1. Our records do not definitely show when the tracks were changed, but I know that the sharpness of the curve in the tracks as they were built under the 1900 agreement was such that cars could not get around the curve. For that reason the tracks were straightened out. When the track was built curving up to the River the cost of construc-
675 tion was paid by the Alton Railroad, but the tracks that the Alton paid for are no longer in existence. No portion of them, as shown on Petitioner's Exhibit 5, is now left. The tracks shown as curved on Exhibit 5 have been rebuilt in another location. I don't know who paid for the tracks in the position
676 in which they now lie. All that portion of the track here involved is within the plant of the Gas Company, which is surrounded by a fence. When I testified before, I said this portion of the track belonged to the Alton Railroad, and based that statement on the fact that we paid for the tracks as constructed under the agreement of 1900. That fact
677 led me to believe that the Alton owned that particular piece of the track. I find now that the track that was then built and paid for by the Alton is no longer in existence.

Cross Examination.

The fence enclosing the plant of the Gas Company does not prevent the passage of cars over the track. There is a gate in the fence fronting on Loomis

Street. The fence never has interfered with the operation, but the gate can be closed. There is a gateway into the plant, but I can't say definitely that there is a gate which swings over the track. In my testimony given on February 28, 1935, I said the Alton constructed a part of this track, beginning in lot 4, as shown on Exhibit 5. That testimony was given in error. Since then I have investigated the matter and found out the facts about which I testified today. The original construction by the Alton Railroad began about the middle of lot 4. The curve started about the middle of lot 5. I don't know who reconstructed the track on a straight line. The alignment of the track at the present time across lots 4 and 5, as shown on Exhibit 1, does not agree with the alignment as shown on Exhibit 5. I think that all of the track in those lots was relocated. My testimony is that the portion of the track beginning in lot 4 was reconstructed and relocated, but I don't know who did it. It might have been practicable to straighten the track out without completely rebuilding it in Lot 4. There is a small portion of it in lot 4 which would not have to be rebuilt. I recall testifying on January 12th that the Alton admitted the ownership of that portion of the track beginning in lot 4 in blocks 7, 8 and 9 to the stub end of the track adjacent to the River. That is the testimony I desired to correct and change. I do not think we own any track in the Gas Company's plant. Due to the fact that there is a turn-out from the track, I think it would be necessary to reconstruct that portion of the track appearing in lot 5. Perhaps 40 feet of it would not have to be removed, but would have to be relocated. In relocating it, the same rails might be used, but I don't think they

were. We did some work in there along about 1910 for the Gas Company, and in the reconstruction of these tracks I think it is quite likely that heavier rail was placed. I don't definitely know that. I only say that the heavier rail might have been used.

686 *Re-direct Examination.*

After rail has been used in a curve it is not practical to use it in a straight track. It is only good for scrap.

Re-cross Examination.

There were some straight rails in the tracks from the point of curve up to the River that could have been used in the track in its new location, but I don't
687 know who did it or anything about it. I don't know whether the Railroad did it or the Gas Company.

Re-direct Examination.

The track now in dispute is shown on Petitioner's Exhibit 1 in yellow. That track as it now exists, clear out to the end of it, is shown in yellow on Petitioner's Exhibit 1.

The Examiner: Let the records show that the case is being continued until January 27, 1937, for further evidence and oral argument.

689 Consolidated cases 22201 and 24391 called and heard January 27, 1937. Oral argument had before the Commission and case taken under advisement.

690 Report of proceedings had January 27, 1937. on the hearing before the Illinois Commerce Commission in its Dockets 22201 and 24391. Appearances same as before.

691 The Examiner: When the hearings closed on January 14th it was agreed that the records should be left open for further evidence, if desired. Do you have any further evidence?

Mr. Cardy: No further evidence.

Mr. Dines: I have nothing further.

Mr. Towner: Nothing further from me.

The Examiner: The record may show that the case is to be argued today before the Commission. If there is nothing further, the record may be closed. (Which were all the proceedings had in the above entitled causes on the day and date aforesaid.)

693 Order entered by Illinois Commerce Commission on March 24, 1937, in its Dockets 24391 and 22201, Consolidated. Said order is reproduced in full at pages 2 to 34 of this abstract.

719 Copy of order mailed on March 31, 1937, to all parties of record.

720 Copy of notice of appeal to the Circuit Court of Cook County by The Alton Railroad Company from order made by Illinois Commerce Commission on March 24, 1937, in Consolidated cases 24391 and 22201, filed April 13, 1937. Notice shows service upon Secretary of Illinois Commerce Commission on April 13, 1937.

722 Certificate of Secretary of Illinois Commerce Commission, dated May 1, 1937, that foregoing record is a true, correct and complete copy of the record of the Illinois Commerce Commission in its Dockets 24391 and 22201, Consolidated.

724 Appearance of Peoples Gas Light & Coke Company by Cook, Sullivan & Ricks, filed on May 22,

1937, in the Circuit Court of Cook County, in case of *Moulding-Brownell Corp.* v. *The Alton Railroad Co.*, No. 37C-4220.

726 Copy of Notice of Attorneys for The Alton Railroad Company to Attorney General of Illinois, C. C. Cardy, Cook, Sullivan & Ricks and Isham, Lincoln & Beale, filed in the Circuit Court of Cook County, on August 23, 1937, that they desire case of *The Alton Railroad Company* v. *Illinois Commerce Commission, ex rel., Moulding-Brownell Corporation, et al.*, Circuit Court of Cook County, No. 37C-4220, placed upon the trial calendar.

747 Copy of order entered October 1, 1937, by Judge LaBuy, Judge of the Circuit Court of Cook County, assigning case of *The Alton Railroad Company* v. *Illinois Commerce Commission*, General No. 37C-4220, to Judge George W. Bristow.

749 Copy of appearance of Gerson Marks, filed October 4, 1937, in Circuit Court of Cook County, as attorney for Illinois Commerce Commission.

751 Copy of notice filed October 8, 1937, signed by Otto Kerner, Attorney General, and directed to Winston, Strawn & Shaw, Cook, Sullivan & Ricks and Clarence Cardy, that he has filed with Judge Bristow a Memorandum of Authorities in the case of *The Alton Railroad Company* v. *Illinois Commerce Commission*, Circuit Court of Cook County, No. 37C-4220.

753 Copy of motion of The Alton Railroad Company filed October 9, 1937, for new trial or rehearing in case of *The Alton Railroad Company* v. *Illinois Commerce Commission, ex rel*, Circuit Court of Cook County, No. 37C-4220. Motion is as follows:

MOTION.

Now comes the plaintiff, The Alton Railroad Company, a corporation, by Silas H. Strawn and Frank H. Towner, its attorneys, and moves the Court to grant a new trial or a rehearing in the above entitled cause, and as reasons therefor asserts:

1. The Court erred in failing to find that the order of the Illinois Commerce Commission made in its Dockets numbered 22201 and 24391 on March 24, 1937, constituted a taking of plaintiff's property without due process of law, in violation of its rights under Section 2 of Article II of the Constitution of the State of Illinois and the Fourteenth Amendment to the Constitution of the United States.

2. The Court erred in failing to find that the Illinois Commerce Commission, in making its said order, exceeded the powers conferred upon it by statute.

3. The Court erred in failing to find that there was no substantial foundation in the evidence for said order of the Illinois Commerce Commission.

754 4. The Court erred in approving and affirming the said order of the Illinois Commerce Commission.

5. The Court erred in failing to reverse and set aside the said order of the Illinois Commerce Commission.

6. The Court erred in failing to find that the Illinois Commerce Commission did not, in making its said order, make definite and specific findings of fact, and also erred in failing to find that the said Commission failed in said order to make the findings

of fact and to reach the conclusions required by the law and the evidence.

7. The Court erred in holding that the spur track dealt with in the said order of the Illinois Commerce Commission was a part of the railroad operated by plaintiff; and further erred in holding that plaintiff was under the obligation to continue the maintenance and operation of said spur track and the rendering of railroad transportation service by means thereof.

WHEREFORE, Plaintiff prays that the Court may grant a new trial or rehearing herein.

Silas H. Strawn
F. H. Towner
Attorneys for Plaintiff.

756 Copy of order entered October 9, 1937, by Judge George W. Bristow in case of *The Alton Railroad Company* v. *Illinois Commerce Commission*, Circuit Court of Cook County, No. 37C-4220, denying motion of plaintiff for new trial or for rehearing. Exception to the order by plaintiff, The Alton Railroad Company.

758 Copy of order entered October 9, 1937, by Judge George W. Bristow in case of *The Alton Railroad Company* v. *Illinois Commerce Commission*, Circuit Court of Cook County, No. 37C-4220, affirming order of Illinois Commerce Commission, dated March 24, 1937, and made by it in cases docketed by said Commission as numbers 24391 and 22201. Exception to the order by plaintiff, The Alton Railroad Company.

760 Copy of notice of appeal by The Alton Railroad Company to the Supreme Court of Illinois from

order entered October 9, 1937, in the Circuit Court of Cook County, in the case of *The Alton Railroad Company, Plaintiff and Appellant*, v. *Illinois Commerce Commission, ex rel., Moulding-Brownell Corporation, et al., Defendants and Appellees*, No. 37C-4220, in which order it was decreed that the order of the Illinois Commerce Commission dated March 24, 1937, in the cases docketed by said Commission as Nos. 24391 and 22201 be affirmed. Notice was filed in Circuit Court of Cook County on October 26, 1937; states prayer of Appellant that said order of the Circuit Court of Cook County may be reversed, and that the order of the Illinois Commerce Commission, affirmed by said Circuit Court of Cook County, may be reversed and set aside; and bears acknowledgement of service of the notice on October 25, 1937, by Otto Kerner, Attorney General of Illinois, as attorney for Illinois Commerce Commission, Cook, Sullivan and Ricks, as attorneys for Peoples Gas Light and Coke Company, C. B. Cardy and W. S. Garman, as attorneys for Moulding-Brownell Corporation, and Heldmaier Stone Company, and Isham, Lincoln & Beale, as attorneys for the Commonwealth Edison Company.

762 Copy of stipulation filed October 26, 1936, in case of *The Alton Railroad Company* v. *Illinois Commerce Commission, ex rel*, No. 37C-4220, in the Circuit Court of Cook County, that on appeal of said case to the Supreme Court of Illinois, the record and order of the Illinois Commerce Commission in the cases docketed by said Commission as numbers 24391 and 22201, as certified to by said Commission, and filed in the Circuit Court of Cook County, may be used instead of a copy of the same. Stipulation is dated October 25, 1937, and is signed by At-

torneys for The Alton Railroad Company, the Illinois Commerce Commission, the Peoples Gas Light & Coke Company, the Moulding-Brownell Corporation and Heldmaier Stone Company, and the Commonwealth Edison Company.

764 Copy of praecipe for record, filed October 26, 1937, by Attorneys for The Alton Railroad Company, in the Circuit Court of Cook County in case of *The Alton Railroad Company* v. *Illinois Commerce Commission, ex rel.*, No. 37C-4220, on appeal to the Supreme Court of Illinois. Shows service on October 25, 1937, on attorneys for Illinois Commerce Commission, Peoples Gas Light and Coke Co., Moulding-Brownell Corporation and Heldmaier Stone Co. and Commonwealth Edison Co.

767 Copy of stipulation filed November 3, 1937, in the Circuit Court of Cook County, in case of *The Alton Railroad Company* v. *Illinois Commerce Commission, ex rel.*, No. 37C-4220, that on appeal of said cause to the Supreme Court of Illinois the original exhibits introduced in evidence on the hearings before the Illinois Commerce Commission in cases docketed by it as numbers 24391 and 22201, as certified to by said Commission and filed in the Circuit Court of Cook County, may be used in the record on appeal instead of copies of the same. Stipulation is dated November 2, 1937, and is signed by attorneys for The Alton Railroad Company, Illinois Commerce Commission, Peoples Gas Light & Coke Co., Moulding-Brownell Corporation and Heldmaier Stone Co., and Commonwealth Edison Co.

768 Certificate of Clerk of Circuit Court of Cook County.

SILAS H. STRAWN,
FRANK H. TOWNER,
Attorneys for Appellant.

[fols. 129-130] IN SUPREME COURT OF ILLINOIS

Case No. 24531

THE ALTON RAILROAD COMPANY, Appellant,

vs.

ILLINOIS COMMERCE COMMISSION, ET AL., Appellees

Appeal, Circuit Court of Cook County

ORDER OF SUBMISSION—February 15, 1938

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this court, and it appearing to the Court that Appellant hath filed herein a duly certified copy of the transcript of the record of the proceedings of the Court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs and the said appellee having entered motion to affirm said judgment and for costs and procedendo, and said motion being taken under advisement for final hearing, and the Clerk of this Court reporting that said cause is now ready to be taken and the said cause not having been argued orally by counsel for either side, the cause is hereby submitted for the consideration and judgment of the Court:

Therefore, it is ordered by the Court that this cause be and the same is hereby taken under advisement.

[fol. 131] IN SUPREME COURT OF ILLINOIS

Docket No. 24531—Agenda 26—February, 1938.

THE ALTON RAILROAD COMPANY, Appellant,

vs.

THE ILLINOIS COMMERCE COMMISSION ex rel. MOULDING-BROWNELL CORPORATION et al., Appellees.

OPINION—Filed April 20, 1938

MR. JUSTICE ORR delivered the opinion of the Court:

The Moulding-Brownell Corporation filed a petition with the Illinois Commerce Commission alleging that it was

served by a switch-track in the city of Chicago connecting with the Chicago and Alton Railroad and that, although it was the duty of the railroad to maintain this track and to pay certain fees imposed by the city of Chicago, the railroad had refused to do so. Petitioners prayed for an order by the commission requiring the railroad to perform its obligations. Subsequently, the Alton Railroad Company filed a petition with the commission alleging that it did not own the track in question and was under no duty to maintain it. This petition asked the commission to rule that it might discontinue service over the track unless the Moulding-Brownell Corporation and the other industries served by it undertook its maintenance. The two cases were consolidated and after several hearings the commission, on March 24, 1937, ordered that the railroad maintain the track in question. This order was affirmed by the Circuit Court of Cook County and the case is here upon direct appeal under section 69 of the Public Utilities act. (Ill. Rev. Stat. 1937, chap. 111 2/3, par. 73.) The commission found that the power of the city of Chicago to impose a charge for maintenance of the track upon the city streets was not before it and hence made no order on that point. Thus we are not called upon to pass upon that issue.

The findings of fact made by the commission, which are not disputed by any of the parties, show that the construction of the switch-track involved in this proceeding, and the five spur-tracks leading from it, was begun some time before 1884; that except for 150 feet adjacent to the intersection of the switch-track and the main line of the railroad, the tracks are located upon property owned by the four industries served, and that the original expense of building these tracks was borne by these companies. In 1904 the petitioning railroad entered into an agreement with the four industries located along this track whereby it agreed to assume the maintenance of the main switch-track, shown by the plat to be approximately 4,000 feet in length. This agreement was performed by the railroad [fol. 132] until March 26, 1936, when its receiver, appointed by a decree of a Federal court, elected not to continue the contract. The spur-tracks leading from the switch-track into the plants have always been maintained by the respective industries and no question as to their maintenance was raised by the petitions in this case. In 1934, an estimated gross revenue of $40,000 was received by the railroad from

the industries served by the switch-track. It appears that the average "running repair" on the track has cost about $1,000 per year, although the total outlay will be greater than that sum during the next few years, due to necessary replacements.

The only issue before us is whether a railroad can be compelled by the Illinois Commerce Commission to maintain a switch-track built by and upon the property of the industries served by the track. We have previously held that, as between the public and a railroad company, a switch-track built for industrial purposes and across public thoroughfares becomes a part of the main line of the railroad system which it joins and is subject to governmental regulation in the public interest even though it was built by private funds and for the most part on private property. (Public Utilities Com. v. Smith, 298 Ill. 151; St. Louis, Springfield and Peoria Railroad v. Commerce Com., 309 id. 621; Von Oven v. Chicago, Burlington and Quincy Railroad Co., 317 id. 334.) Petitioning railroad does not dispute the correctness of these decisions but contends that they merely determine its duty as a public utility to the public at large. It argues that the duty of maintenance is an incident of the ownership of the track and that since it was under no duty to build the track in the first place and since it does not now own it, the burden of maintenance cannot be imposed upon it. This argument is incompatible with our repeated holdings that switch-tracks of this type, once built, become a part of the main line of the railroad, whether built upon private rights-of-way or upon public streets. (Von Oven v. Chicago, Burlington and Quincy Railroad Co. supra, and cases cited.) It overlooks the fact that petitioning railroad uses this track for its own benefit to serve the industries located thereon, and, under the authorities above cited, may use the track, or extensions thereto, conveniently to serve other shippers and the public at large. The public, therefore, has an interest in the proper maintenance of this track quite apart from the interest of the parties to this suit. It was said by the Supreme Court of [fol. 133] Wisconsin in Union Lime Co. v. Railroad Com., 144 Wis. 523, 129 N. W. 605, that over such tracks "the products of the industry find their way into the markets of the world and every consumer is directly interested in the lessened cost of such products resulting from the building and operation thereof. That these products are supplied by a single

owner, or by a limited number of owners, affects the extent and not the nature of its use—the track is none the less a part of the avenue through which the commodities reach the public. * * * Except that it [the railroad] is relieved of the initial cost of right of way and construction, the track stands in the same relation to it that any other portion of its track does. The owner of the industry obtains no interest in or control over it beyond that of being served by it equally with any one else who may desire to use it."

Section 50 of the Public Utilities act provides: "Whenever the commission, after a hearing had upon its own motion, or upon complaint, shall find that additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public utility * * * ought resonably to be made * * * to promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities, the commission shall make and serve an order directing that such additions, extensions, repairs, improvements or changes be made. * * * in the manner and within the time specified in said order." This section is broad enough to impose a duty upon a railroad to maintain property which it uses for its own profit as well as that to which it has title, and, under the act, the commission has ample authority to enforce it.

Petitioning railroad contends, however, that because other industries in Chicago provide and maintain connecting spur-tracks at their own expense, the order of the commission in this case will result in discrimination. It appears, however, that such connections are similar in nature to the five spur-tracks leading from the switch-track in question here. These connections have been, and apparently will continue to be, maintained by the individual companies to whose premises they lead. Hence no discrimination is apparent.

The order of the Illinois Commerce Commission was within its statutory power and does not violate any provision of the State or Federal constitutions. The judgment of the circuit court of Cook county, sustaining the order of the commission, is affirmed.

Judgment affirmed.

[fols. 134-136] In Supreme Court of Illinois

The Alton Railroad Company, Appellant,

vs.

Illinois Commerce Commission ex Rel. Moulding-Brownell Corporation et al., Appellees

Appeal From Circuit Court Cook

37C4220

Judgment—April 20, 1938

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the Judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error;

Therefore, it is considered by the Court that the Judgment of the Circuit Court aforesaid, be affirmed in all things and stand in full force and effect, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that the said Appellees recover of and from the said Appellant costs by them in this behalf expended, to be taxed, and that they have execution therefor.

I, Adam F. Bloch, Clerk of the Supreme Court of the State of Illinois and Keeper of records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Testimony Whereof, I have set my hand and affixed the Seal of the said Supreme Court, in Springfield, in said State, this 22nd day of June, in the year of our Lord one thousand nine hundred and Thirty-eight.

Adam F. Bloch, Clerk of the Supreme Court. (Seal of the Supreme Court, State of Illinois.)

[fols. 137-138] IN SUPREME COURT OF ILLINOIS

[Title omitted]

ORDER DENYING REHEARING—June 15, 1938

Now on this day the Court having duly considered the petition for rehearing filed herein and the Court being now advised in the premises doth overrule the prayer of the petition and denies a rehearing of this cause.

[fol. 139] IN SUPREME COURT OF ILLINOIS

[Title omitted]

PETITION FOR APPEAL—Filed July 1, 1938

To the Honorable Elwyn R. Shaw, Chief Justice of the Supreme Court of Illinois.

Now comes The Alton Railroad Company, Petitioner herein, by its attorneys, and respectfully shows:

(1) That Petitioner is the Appellant in the above entitled cause.

(2) That on April 20, 1938, on the appeal of Petitioner, the Supreme Court of Illinois affirmed a judgment of the Circuit Court of Cook County, entered on October 9, 1937, affirming an order of the Illinois Commerce Commission, dated March 24, 1937, and made by it in cases docketed by said Commission as Nos. 24391 and 22201.

(3) That thereafter Petitioner applied for a rehearing in the Supreme Court of Illinois, which petition was denied by said Court on January 15, 1938.

[fol. 140] (4) That in said cause there is drawn in question the validity of a statute of the State of Illinois, on the ground of its being repugnant to the Constitution and Laws of the United States, and the decision is in favor of its validity; in that the said order of the said Commission, so upheld by the decision of the Supreme Court of Illinois, deprives Petitioner of its property without due process of law in violation of its rights under the Fourteenth Amendment to the Constitution of the United States.

Wherefore, Petitioner prays that it be allowed an appeal from said Supreme Court of the State of Illinois, which is the highest court of said State, to the Supreme Court of the United States, in order that the decision of the Supreme Court of the State of Illinois may be examined and reversed; that a transcript of the record, proceedings and papers, on which said final order or judgment of the Supreme Court of the State of Illinois was made and entered in said case, duly authenticated by the Clerk of the Supreme Court of the State of Illinois, may be sent to the Supreme Court of the United States, as provided by law, and that a proper order relating to the security to be required of it be made.

The errors, upon which Petitioner claims to be entitled to an appeal, are those above indicated and are more fully set out in the Assignment of Errors filed herewith.

The Alton Railroad Company, a Corporation, by
Silas H. Strawn, Frank H. Towner, Its Attorneys.

Dated July 1st, 1938.

[fols. 141-142] [File endorsement omitted.]

[fol. 143] IN SUPREME COURT OF ILLINOIS

[Title omitted]

ORDER ALLOWING APPEAL—Filed July 1, 1938

The petition of The Alton Railroad Company for an appeal in the above cause to the Supreme Court of the United States from the Supreme Court of the State of Illinois, and the Assignment of Errors filed therewith, and the record of said cause having been considered,

It is Ordered that an appeal by said Petitioner to the Supreme Court of the United States from the Supreme Court of the State of Illinois, be and the same is allowed as prayed in said petition, and that the Clerk of the Supreme Court of the State of Illinois shall prepare and certify a transcript of the record, proceedings and papers in the above cause, and transmit the same to the Supreme Court of the United States within thirty (30) days from the date hereof.

It is Further Ordered that said The Alton Railroad Company shall give good and sufficient security in the sum of

Two Hundred and Fifty Dollars ($250.00) that it shall [fol. 144] prosecute said appeal to effect and that if it shall fail to make its plea good, it shall answer all costs.

Elwyn R. Shaw, Chief Justice of the Supreme Court of Illinois.

Dated July 1st, 1938.

[fols. 145-146] [File endorsement omitted.]

[fol. 147] IN SUPREME COURT OF ILLINOIS

[Title omitted]

ASSIGNMENT OF ERRORS—Filed July 1, 1938

Now comes The Alton Railroad Company and presents with its petition for appeal herein, this assignment of errors, and says that in the record and proceedings in the above entitled cause, and the order and judgment made and entered therein on April 20, 1938, by the Supreme Court of the State of Illinois, there is error in the particulars hereinafter set forth.

The Supreme Court of the State of Illinois erred in making and entering said order and judgment in the following respects:

(1) It erred in holding that the order of the Illinois Commerce Commission, made in its Dockets Nos. 22201 and 24391, on March 24, 1937, did not constitute a taking of petitioner's property without due process of law, in violation of petitioner's rights under the Fourteenth Amendment to the Constitution of the United States.

(2) It erred in failing to hold that said order of the Illinois Commerce Commission constituted a taking of petitioner's property without due process of law, in violation [fol. 148] of petitioner's rights under the Fourteenth Amendment to the Constitution of the United States.

(3) It erred in approving the said order of the Illinois Commerce Commission.

(4) It erred in failing to reverse and set aside the said order of the Illinois Commerce Commission.

(5) It erred in requiring petitioner to continue the maintenance and operation of the switch track dealt with in said order of the Illinois Commerce Commission, and the rendering of railroad transportation by means thereof to industries served thereby.

(6) It erred in holding that petitioner should not be permitted to discontinue the rendering of railroad transportation over the switch track dealt with in said order of the Illinois Commerce Commission, in the absence of the payment by the industries served thereby of all charges for the maintenance of said switch track and of all fees charged by the City of Chicago for maintaining it in its present location.

(7) It erred in holding that the continued maintenance of said switch track by petitioner, and the continued payment of ordinance fees to the City of Chicago by petitioner, would not produce an unlawful discrimination.

(8) It erred in basing the conclusion reached by it upon Section 50 of the Public Utilities Act of Illinois.

(9) It erred in affirming the judgment of the Circuit Court of Cook County, sustaining the order of the Commission.

(10) It erred in failing to reverse the said judgment of the Circuit Court of Cook County, and in failing to reverse [fol. 149] and set aside the said order of the Illinois Commerce Commission.

Wherefore, said The Alton Railroad Company prays that the said order or judgment, made and entered herein on April 20, 1938, be reversed, and that the Supreme Court of Illinois be directed to enter an order or judgment reversing the said judgment of the Circuit Court of Cook County, and reversing and setting aside the said order of said Illinois Commerce Commission.

The Alton Railroad Company, by Silas H. Strawn,
Frank H. Towner, Its Attorneys.

[fols. 150-150a] [File endorsement omitted.]

[fol. 151] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD—Filed July 12, 1938

It is Hereby Stipulated and Agreed by and between the parties hereto, by their attorneys, pursuant to paragraph 2 of Rule 10 of the Rules of the Supreme Court of the United States, that the transcript of record to be prepared by the Clerk of the Supreme Court of the State of Illinois, for transmission to the Supreme Court of the United States on the appeal of The Alton Railroad Company in the above entitled cause from the Supreme Court of the State of Illinois to the Supreme Court of the United States, shall include the following:

(1) The printed abstract of record filed in said cause in the Supreme Court of the State of Illinois;

(2) A copy of the order of submission of said cause in said Court;

(3) A copy of the opinion of said Court in said cause, together with the order of said Court thereon;

(4) A copy of the petition for rehearing in said cause, filed in said Court by appellant, The Alton Railroad Company;

[fol. 152] (5) A copy of the order of said Court denying said petition for rehearing;

(6) A copy of the petition of The Alton Railroad Company for appeal from said Court to the Supreme Court of the United States;

(7) A copy of the order, signed by the Chief Justice of the Supreme Court of the State of Illinois, allowing an appeal in said cause from the Supreme Court of the State of Illinois to the Supreme Court of the United States;

(8) A copy of the assignment of errors on said appeal filed in the Supreme Court of the State of Illinois by The Alton Railroad Company;

(9) A copy of the statement, filed in said Court by The Alton Railroad Company, of the basis upon which the Supreme Court of the United States has jurisdiction upon appeal to review the judgment of the Supreme Court of the State of Illinois in said cause;

(10) Copies of any statement filed by any appellee making against the jurisdiction of the Supreme Court of the

United States asserted by The Alton Railroad Company, together with copies of any motions to dismiss said appeal or affirm the final order of the Supreme Court of the State of Illinois therein, and of proof of service thereof upon counsel for The Alton Railroad Company;

(11) A copy of notice to the attorneys for Illinois Commerce Commission, Peoples Gas Light & Coke Company, Moulding-Brownell Corporation, E. Heldmaier, Inc. and Commonwealth Edison Company, serving upon each of them copies of the petition for appeal in said cause, the order granting said appeal, the assignment of errors filed with said petition for appeal, and the statement of the basis upon which the Supreme Court of the United States has jurisdiction upon appeal to review the final judgment entered in said cause by the Supreme Court of the State of [fol. 153] Illinois; and directing the attention of each of them to the provisions of paragraph 3 of Rule 12 of the Rules of the Supreme Court of the United States;

(12) A copy of the citation on said appeal in said cause, with acknowledgment of the service thereof;

(13) A copy of the appeal bond on said appeal, filed in the Supreme Court of the State of Illinois by The Alton Railroad Company;

(14) A copy of this stipulation with respect to the transcript of record on said appeal.

It is Further Stipulated and Agreed by and between the parties hereto, by their respective attorneys, that the transcript of record containing the foregoing documents, will contain a statement of all the evidence and proceedings in said cause necessary to a determination of said cause in the Supreme Court of the United States on said appeal.

Silas H. Strawn, Frank H. Towner, Attorneys for The Alton Railroad Company, Appellant. Otto Kerner, Attorney General of Illinois, for Illinois Commerce Commission, Appellee. Cooke, Sullivan & Ricks, Attorneys for Peoples Gas Light & Coke Company, Appellee. Clarence B. Cardy, Attorney for Moulding-Brownell Corporation, and E. Heldmaier, Inc., Appellees. Isham & Lincoln, Beale, Attorneys for Commonwealth Edison Company, Appellee.

Dated July 11th, 1938.

[fol. 154] [File endorsement omitted.]

[fol. 155] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 156] In Supreme Court of the United States

Statement of Points to be Relied upon by Appellant and Designation of Parts of Record to be Printed—Filed August 3, 1938

Now comes The Alton Railroad Company, appellant in the above entitled cause, by Silas H. Strawn and Frank H. Towner, its attorneys, and files this statement of the points upon which appellant intends to rely, and of the parts of the record which it thinks necessary for the consideration thereof, together with proof of service of the same upon appellees.

Statement of Points to be Relied upon by Appellant

(1) The Supreme Court of Illinois erred in holding that the order of the Illinois Commerce Commission made in said Commission's Dockets Nos. 22201 and 24391, on March 24, 1937, did not constitute a taking of appellant's property without due process of law, in violation of appellant's rights under the Fourteenth Amendment to the Constitution of the United States.

(2) The Supreme Court of Illinois erred in failing to hold that said order of the Illinois Commerce Commission constitutes the taking of appellant's property without due process of law, in violation of appellant's rights under the Fourteenth Amendment to the Constitution of the United States.

(3) The Supreme Court of Illinois erred in approving the said order of the Illinois Commerce Commission and in [fol. 157] failing to reverse and set aside said order.

(4) The Supreme Court of Illinois erred in requiring appellant to continue the maintenance and operation of the switch track dealt with in said order of the Illinois Commerce Commission, and the rendering of railroad transportation by means thereof to the industries served thereby, and erred in holding that appellant should not be permitted to discontinue the rendering of railroad transportation over said switch track in the absence of the payment by the in-

dustries served thereby of all charges for the maintenance of said switch track, and of all fees charged by the City of Chicago for maintaining it in its present location.

(5) The Supreme Court of Illinois erred in holding that the continued maintenance of said switch track by appellant, and the continued payment of ordinance fees to the City of Chicago by appellant, would not produce an unlawful discrimination.

(6) The Supreme Court of Illinois erred in basing the conclusion reached by it upon Section 50 of the Public Utilities Act of Illinois.

(7) The Supreme Court of Illinois erred in affirming the order of the Circuit Court of Cook County sustaining the said order of said Commission, and erred in failing to reverse the said judgment of the Circuit Court of Cook County and in failing to reverse and set aside the said order of the Illinois Commerce Commission.

Designation of Parts of Record to be Printed

Appellant hereby designates for printing the entire transcript of record filed herein, which it thinks necessary for consideration in determining the appeal herein, excepting, however, the following parts of said transcript of record:

(1) The petition for rehearing filed by appellant in the [fol. 158] Supreme Court of Illinois.

(2) The citation on appeal from the Supreme Court of Illinois to the Supreme Court of the United States, and the acknowledgment of the service thereof.

(3) The appeal bond filed in the Supreme Court of Illinois on the appeal from said court to the Supreme Court of the United States.

(4) The following parts of the abstract of record which was filed in the Supreme Court of Illinois, and is included in the transcript of record filed in the Supreme Court of the United States:

(a) Those parts of said abstract of record appearing on page 35 thereof, identified as appearing at pages 52, 53 and 55 of the original record filed in the Supreme Court of Illinois, and being the last seven lines on said page 35 of said abstract.

(b) The parts of said abstract of record appearing on page 36 thereof, identified as appearing at pages 56, 57, 58, 59, 61, 62, 63 and 65 of the original record filed in the Supreme Court of Illinois, and being the first eighteen lines on said page 36 of said abstract.

(c) Those parts of said abstract of record appearing on page 38 thereof, identified as appearing at pages 85, 89, 90 and 92 of the original record filed in the Supreme Court of Illinois, and being the last nine lines of said page 38 of said abstract.

(d) Those parts of said abstract of record appearing on page 39 thereof, identified as appearing at pages 93, 94, 95, [fol. 159] 100, 106, 109, 112, 115 and 119 of the original record filed in the Supreme Court of Illinois, and being the first twenty-four lines of said page 39 of said abstract.

(e) That part of said abstract of record appearing on page 51 thereof and identified as appearing at page 202 of the original record filed in the Supreme Court of Illinois.

(f) That part of said abstract of record appearing on page 52 thereof and identified as appearing at page 212 of the original record filed in the Supreme Court of Illinois.

(g) Those parts of said abstract of record appearing on page 96 thereof, identified as appearing at pages 490, 492, 494 and 508 of the original record filed in the Supreme Court of Illinois, and being the last thirteen lines of said page 96 of said abstract.

(h) That part of said abstract of record appearing on page 97 thereof and identified as appearing at page 513 of the original record filed in the Supreme Court of Illinois.

(i) Those parts of said abstract of record appearing on page 109 thereof and identified as appearing at pages 597 and 599 of the original record filed in the Supreme Court of Illinois.

(j) That part of said abstract of record appearing at page 118 thereof and identified as appearing at page 665 of the original record filed in the Supreme Court of Illinois.

Silas H. Strawn, Frank H. Towner, Attorneys for Appellant.

[fols. 160-167] Service of the foregoing statement of points to be relied upon by appellant on the appeal herein, and designation of parts of the record to be printed, and receipt

of a copy thereof are hereby acknowledged this 1st day of August, 1938.

Otto Kerner, Attorney General of Illinois, for Illinois Commerce Commission, Appellee. Cooke, Sullivan and Ricks, Attorneys for Peoples Gas Light & Coke Company, Appellee. C. B. Cardy, Attorney for Moulding-Brownell Corporation, and E. Heldmaier, Inc., Appellees. Isham, Lincoln & Beale, Attorneys for Commonwealth Edison Company, Appellee.

[fol. 168] [File endorsement omitted.]

Endorsed on cover: File No. 42,716. Illinois Supreme Court. Term No. 231. The Alton Railroad Company, Appellant, vs. Illinois Commerce Commission, Moulding-Brownell Corporation, and E. Heldmaier, Inc., et al. Filed July 29, 1938. Term No. 231, O. T., 1938.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 231

THE ALTON RAILROAD COMPANY,
Appellant,

vs.

ILLINOIS COMMERCE COMMISSION, MOULDING-BROWNELL CORPORATION AND E. HELDMAIER, INC., ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

STATEMENT AS TO JURISDICTION.

SILAS H. STRAWN,
FRANK H. TOWNER,
Counsel for Appellant.

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SUPREME COURT OF ILLINOIS

No. 231

THE ALTON RAILROAD COMPANY,
Petitioner,

vs.

ILLINOIS COMMERCE COMMISSION, EX REL., MOULDING-BROWNELL CORPORATION ET AL.,
Respondents.

STATEMENT BY PETITIONER OF BASIS ON WHICH THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION UPON APPEAL TO REVIEW THE FINAL JUDGMENT OR ORDER ENTERED HEREIN.

Now comes The Alton Railroad Company, petitioner herein, and presents this statement of the basis upon which the Supreme Court of the United States has jurisdiction upon appeal to review the final judgment or order entered herein on April 20, 1938.

(1) In this suit petitioner sought to reverse and set aside an order (R. 6) made by the Illinois Commerce Commission (hereinafter called the "Commission") on March 24, 1937, in two proceedings before it, known as its Docket No. 22201, *Moulding-Brownell Corporation and E. Heldmaier, Inc.*, v. *The Alton Railroad Company et al.*, and its Docket No. 24391, *Petition of The Alton Railroad Company for an order authorizing the discontinuance of service, etc.* The two cases were consolidated for hearing and decision

by the Commission, and presented the question whether petitioner should be permitted to discontinue the rendering of service over a certain switch track in the City of Chicago in the absence of the payment by the industries served by the track of the cost of its maintenance and of fees charged under ordinance of the City of Chicago for the maintenance of the track over public streets and alleys in said city (R. 25). The track involved was not built by petitioner, is not owned by it and is not located upon property owned by it.

From 1904 until 1924 the costs of maintaining the track were borne by petitioner, under agreement with the industries served by the track, and the ordinance charges of the City of Chicago were paid by the industries. Upon the expiration of that agreement, petitioner and the industries served by the track became involved in a controversy as to who should bear the future cost of maintenance and the payments to the City of Chicago. During that controversy, the charges were paid by petitioner, and the controversy culminated in the filing of the petitions. The Commission made an order in the cases on October 28, 1936 (R. 583), but granted a rehearing on petitioner's petition therefor (R. 596), and thereafter made its order of March 24, 1937.

That order required petitioner to continue to expend its funds in the maintenance and operation of the track involved (R. 30), denied the application of petitioner for authority to discontinue operation over the track (R. 30), and found that the power of the City of Chicago to impose a charge for the maintenance of the track over city streets was not before it and that no order on that point was necessary (R. 22, 23, 25). On April 14, 1937, petitioner appealed the order of the Commission to the Circuit Court of Cook County (R. 3, 720) as permitted by Illinois statute (Ill. Rev. Stat. 1937, Ch. 111 2/3, Sec. 72, p. 2497), and on October 9, 1937, an order was entered in that court (R. 758), affirm-

ing the order of the Commission without opinion. Petitioner filed a petition for a new trial or rehearing in the Circuit Court of Cook County (R. 753, 754) and upon the denial of this motion (R. 756), appealed from the decision of that court to the Supreme Court of Illinois, which is the highest court of the State (R. 760. See Ill. Rev. Stat. 1937, Ch. 111 2/3, Sec. 73, p. 2498). The Supreme Court of Illinois, on April 20, 1938, affirmed the order of the Circuit Court, sustaining the order of the Commission, and on June 15, 1938 entered an order denying petitioner's petition for a rehearing.

(2) The jurisdiction of the Supreme Court of the United States to review said judgment or order on appeal is sustained by the following statutory provisions: Section 237 of the Judicial Code (28 U. S. C. A. Sec. 344) provides in part as follows:

> "A final judgment or decree in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

By amendment of January 31, 1928, to the Judicial Code, the writ of error was abolished, and it was provided that all relief, which theretofore could be obtained by writ of error, should be obtainable by appeal (28 U. S. C. A., Sec. 861a). By another amendment of April 26, 1928 (28 U. S. C. A. Sec. 861b), it was provided that the statutory provisions relating to writs of error should be applicable to appeal.

(3) The judgment or order sought to be reviewed upon this appeal was made and entered on April 20, 1938, and petitioner's petition for rehearing was denied on June 15, 1938. The petition for appeal herein, together with an assignment of errors, was presented and the order allowing the appeal was entered on July 1, 1938. The Judicial Code (28 U. S. C. A., Sec. 350) provides in part as follows:

> "No writ of error, appeal or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree, except that writs of certiorari to the Supreme Court of the Philippines may be granted where application therefor is made within six months."

(4) Petitioner asserts that the order of the Commission, made on March 24, 1937, and upheld by the Supreme Court of Illinois, deprives it of its property without due process of law in violation of its rights under the Fourteenth Amendment to the Constitution of the United States. That order requires petitioner to assume an obligation of ownership by expending its money in the maintenance of railroad track not constructed by petitioner, not owned by it, and not located upon property owned by it, but does not hold that under Illinois law the track belongs to petitioner or that petitioner may exercise with respect to it all rights deriving from ownership.

The petition filed with the Commission by petitioner alleged (R. 237) that petitioner does not own the track involved or the land upon which that track is located. The order of the Commission assumed that the facts in the consolidated case are as alleged in the petition filed with it by petitioner (R. 15), and specifically finds that the track involved was constructed by parties other than petitioner, upon property not owned by petitioner (R. 25).

The claim of the violation of petitioner's constitutional rights under the order of the Commission was made in the motion for a new trial or rehearing, filed in the Circuit Court of Cook County (R. 753), which was the first occasion upon which the claim could be made under the statutory procedure relating to appeals from orders of the Commission. It was not dealt with in any opinion of the Circuit Court, since that Court wrote no opinion and only entered an order affirming the order of the Commission (R. 758). Nor was it dealt with in the order of the Circuit Court denying petitioner's motion for a new trial or rehearing, as that order did nothing more than deny the motion (R. 76).

The claim was also made upon the appeal to the Supreme Court of Illinois, it being asserted in the Statement of Errors contained in petitioner's brief filed with that Court (p. 17) that

> "the Trial Court erred in failing to find that the order of the Illinois Commerce Commission, made in its Dockets Nos. 22201 and 24391, on March 24, 1937, constituted a taking of appellant's property without due process of law in violation of its rights under * * * the Fourteenth Amendment to the Constitution of the United States."

Under the practice in Illinois, no assignment of errors is filed with the Supreme Court of Illinois and included in the record of any case, these assignments being replaced by a statement of errors which is incorporated in appellant's brief.

The claim was passed upon by the Supreme Court of Illinois in its opinion delivered on April 20, 1938, the last paragraph of which reads as follows:

> "The order of the Illinois Commerce Commission was within its statutory power and does not violate any provisions of the State or Federal Constitutions."

(5) The constitutional grounds upon which this appeal is based are substantial in character, in that there is no decision of this Court sustaining any such order of a state administrative body under the circumstances obtaining in this case. On the contrary, the decisions of this Court indicate that a railroad must own a switch track before it can be required to assume an obligation of ownership, such as the maintenance thereof.

In *Union Lime Co.* v. *Chicago & Northwestern Ry. Co.*, 233 U. S. 211, it appeared that under the law of Wisconsin the track there involved would, after its construction, be owned by the Railway Company, it being stated by this Court (p. 222) that there is a clear distinction between spurs, which are owned and operated by a common carrier as a part of its system and under its public obligation, and merely private sidings.

In *Chicago & Northwestern Railway Co.* v. *Ochs*, 249 U. S. 416, this Court said (p. 419) that under the law of Minnesota, the track there involved, when constructed, would become the property of the railroad company and an integral part of its railroad system, and be wholly under its control. In *L. E. & W. R. Co.* v. *Public Utilities Commission*, 249 U. S. 422, this Court said (p. 425) that when the track there involved was restored, the railroad company would own it and be entitled to make a reasonable charge for its use.

In this case, there is no holding or suggestion that the track involved belongs to petitioner. With the consent of the industries served by the track, the owner thereof could remove it at any time, thereby depriving petitioner of the right to use it and any amounts spent in the maintenance or replacement thereof.

(6) Cases which sustain the jurisdiction of the Supreme Court of the United States, to review the said judgment

or order of the Supreme Court of the State of Illinois, are as follows:

Wadley Southern R. Co. v. *Georgia*, 235 U. S. 651, 660, 661;

L. E. & W. R. Co. v. *Public Utilities Commission*, 249 U. S. 422, 424;

Bluefield etc. Co. v. *Public Service Commission*, 262 U. S. 679, 683, 384;

Northern Pacific R. Co. v. *Department of Public Works*, 268 U. S. 39, 41, 42;

Live Oak Ass'n v. *Railroad Commission*, 269 U. S. 354, 356.

(7) Attached hereto is a copy of opinion rendered herein by the Supreme Court of the State of Illinois on April 20, 1938, affirming the order of the Circuit Court of Cook County, sustaining the order of the Commission.

Respectfully submitted,

THE ALTON RAILROAD COMPANY,
By SILAS H. STRAWN,
FRANK H. TOWNER,
Its Attorneys.

EXHIBIT "A".

Requisition Number 195501.

ILLINOIS SUPREME COURT.

Decided April 20, 1938.

THE ALTON RAILROAD COMPANY, *Appellant*,

v.

THE ILLINOIS COMMERCE COMMISSION *ex Rel.* MOULDING-BROWNELL CORPORATION ET AL., *Appellees*.

MR. JUSTICE ORR delivered the opinion of the court:

The Moulding-Brownell Corporation filed a petition with the Illinois Commerce Commission alleging that it was served by a switch-track in the city of Chicago connecting with the Chicago and Alton Railroad and that, although it was the duty of the railroad to maintain this track and to pay certain fees imposed by the city of Chicago, the railroad had refused to do so. Petitioners prayed for an order by the commission requiring the railroad to perform its obligations. Subsequently, the Alton Railroad Company filed a petition with the commission alleging that it did not own the track in question and was under no duty to maintain it. This petition asked the commission to rule that it might discontinue service over the track unless the Moulding-Brownell Corporation and the other industries served by it undertook its maintenance. The two cases were consolidated and after several hearings the commission, on March 24, 1937, ordered that the railroad maintain the track in question. This order was affirmed by the circuit court of Cook county and the case is here upon direct appeal under section 69 of the Public Utilities act. (Ill. Rev. Stat. 1937, chap. 111-2/3, par. 73.) The commission found that the power of the city of Chicago to impose a charge for maintenance of the track upon the city streets was not before it and hence made no order on that point. Thus we are not called upon to pass upon that issue.

The findings of fact made by the commission, which are not disputed by any of the parties, show that the construction of the switch-track involved in this proceeding, and the five spur-tracks leading from it, was begun some time before 1884, that except for 150 feet adjacent to the inter-section of the switch-track and the main line of the railroad, the tracks are located upon property owned by the four industries served, and that the original expense of building these tracks was borne by these companies. In 1904 the petitioning railroad entered into an agreement with the four industries located along this track whereby it agreed to assume the maintenance of the main switch-track, shown by the plat to be approximately 4000 feet in length. This agreement was performed by the railroad until March 26, 1936, when its receiver, appointed by a decree of a Federal court, elected not to continue the contract. The spur-tracks leading from the switch-track into the plants have always been maintained by the respective industries and no question as to their maintenance was raised by the petitions in this case. In 1934, an estimated gross revenue of $40,000 was received by the railroad from the industries served by the switch-track. It appears that the average "running repair" on the track has cost about $1000 per year, although the total outlay will be greater than that sum during the next few years, due to necessary replacements.

The only issue before us is whether a railroad can be compelled by the Illinois Commerce Commission to maintain a switch-track built by and upon the property of the industries served by the track. We have previously held that, as between the public and a railroad company, a switch-track built for industrial purposes and across public thoroughfares becomes a part of the main line of the railroad system which it joins and is subject to governmental regulation in the public interest even though it was built by private funds and for the most part on private property. (*Public Utilities Com.* v. *Smith*, 298 Ill. 151; *St. Louis, Springfield and Peoria Railroad* v. *Commerce Com.*, 309 id. 621; *Von Oven* v. *Chicago, Burlington and Quincy Railroad Co.*, 317 id. 334.) Petitioning railroad does not dispute the correctness of these decisions but contends that they merely determine its

duty as a public utility to the public at large. It argues that the duty of maintenance is an incident of the ownership of the track and that since it was under no duty to build the track in the first place and since it does not now own it, the burden of maintenance cannot be imposed upon it. This argument is incompatible with our repeated holdings that switch tracks of this type, once built, become a part of the main line of the railroad, whether built upon private rights-of-way or upon public streets. (*Von Oven* v. *Chicago, Burlington and Quincy Railroad Co., supra,* and cases cited.) It overlooks the fact that petitioning railroad uses this track for its own benefit to serve the industries located thereon, and, under the authorities above cited, may use the track, or extensions thereto, conveniently to serve other shippers and the public at large. The public, therefore, has an interest in the proper maintenance of this track quite apart from the interest of the parties to this suit. It was said by the Supreme Court of Wisconsin in *Union Lime Co.* v. *Railroad Com.*, 144 Wis. 523, 129 N. W. 605, that over such tracks "the products of the industry find their way into the markets of the world and every consumer is directly interested in the lessened cost of such products resulting from the building and operation thereof. That these products are supplied by a single owner, or by a limited number of owners, affects the extent and not the nature of its use—the track is none the less a part of the avenue through which the commodities reach the public. • • • Except that it (the railroad) is relieved of the initial cost of right of way and construction, the track stands in the same relation to it that any other portion of its track does. The owner of the industry obtains no interest in or control over it beyond that of being served by it equally with any one else who may desire to use it."

Section 50 of the Public Utilities act provides: "Whenever the commission, after a hearing had upon its own motion, or upon complaint, shall find that additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public utility • • • ought reasonably to

be made * * * to promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities, the commission shall make and serve an order directing that such additions, extensions, repairs, improvements or changes be made, * * * in the manner and within the time and time specified in said order." This section is broad enough to impose a duty upon a railroad to maintain property which it uses for its own profit as well as that to which it has title, and, under the act, the commission has ample authority to enforce it.

Petitioning railroad contends, however, that because other industries in Chicago provide and maintain connecting spur-tracks at their own expense, the order of the commission in this case will result in discrimination. It appears, however, that such connections are similar in nature to the five spur-tracks leading from the switch track in question here. These connections have been, and apparently will continue to be, maintained by the individual companies to whose premises they lead. Hence no discrimination is apparent.

The order of the Illinois Commerce Commission was within its statutory power and does not violate any provisions of the State or Federal constitutions. The judgment of the circuit court of Cook County, sustaining the order of the commission, is affirmed.

Judgment affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1938.

No. 231

THE ALTON RAILROAD COMPANY,
Appellant,

vs.

ILLINOIS COMMERCE COMMISSION EX REL., MOULDING-BROWNELL CORPORATION, ET AL.,
Appellees.

BRIEF OF APPELLANT IN OPPOSITION TO MOTION BY APPELLEES TO DISMISS OR AFFIRM.

SILAS H. STRAWN,
FRANK H. TOWNER,
Counsel for Appellant.

THE DUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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Appellees.

BRIEF OF APPELLANT IN OPPOSITION TO MOTION BY APPELLEES TO DISMISS OR AFFIRM.

MAY IT PLEASE THE COURT:

This case presents an appeal from an order of the Supreme Court of Illinois, affirming an order of the Circuit Court of Cook County which, in turn, sustained an order of the Illinois Commerce Commission. The order of the Commission requires appellant to expend its funds in the maintenance of a switch track connected with its main line, but which switch track was not constructed by it, is not located upon its property and is not owned by it. The appeal to this court is based upon a claimed violation of appellant's rights under the Fourteenth Amendment to the Constitution of the United States, the claim being made before the Commission, in the Circuit Court, and in the

Supreme Court of Illinois, which passed upon it adversely to appellant's contentions.

The motion to dismiss or affirm concedes that the claim of a violation of appellant's rights under the Federal Constitution was seasonably made, but contends that the federal question involved is not sufficiently substantial to warrant consideration by this Court. We will deal with the argument made in appellees' statement in opposition to jurisdiction in the order in which that argument is made.

(1) *The Facts.*

Included in the transcript of record filed in this court is the abstract of record filed in the Supreme Court of Illinois, and the references herein will be to the pages of that abstract. Facing page 59 of that abstract is a map showing in yellow the track here involved. It is 2,831 feet in length, and five spur tracks extend from it to the appellee industries. The five spurs are not here involved, as they are owned and maintained by the industries.

The facts as set out in appellees' statement are in substance correct, but require some elaboration. It is said that from 1904 up to the present time, appellant and its predecessors in interest have maintained the track involved, although disputing their obligation to do so since 1923. This statement is correct, but it should be added that from November 1, 1904 up to March 26, 1936, these maintenance charges were paid by appellant pursuant to an agreement dated November 1, 1904, between the predecessors of appellant and the predecessors of appellees, Peoples Gas Light & Coke Company and Commonwealth Edison Company (A. 99, 100). This contract was terminated by appellant on March 26, 1936 (Pet. Ex. 15, A. 105), and since that date there has been no contractual obligation upon appellant to incur this expense.

The cost of maintaining the track for the next three years will be approximately $4,000.00 a year, and thereafter will amount to approximately $1,000.00 a year (A. 68, 69), the high cost of maintenance being due to the partial elevation of the track over certain streets and alleys in Chicago. In addition, appellant paid $1,400.00 a year license fee to the City of Chicago from 1923 to 1932 (A. 77), and since 1932, has paid $700.00 a year (A. 78). This charge is made by the City for the occupancy of public streets and alleys by the track. Of this amount paid by appellant, only $900.00 has been refunded to it by appellee, Peoples Gas Light & Coke Company (A. 78). The present ordinance charge made by the City is $700.00 per year (See Pet. Ex. 14, A. 104).

The track here involved is the only switch track not owned by appellant and not located on its right of way, which it maintains at its own expense. In all other instances of switch track not owned by appellant and not on its right of way, the industry served by such track maintains, repairs and renews the track and secures the right of way (A. 70, 71). Under the standard form of switch track agreement used by appellant, the industry to be served by a switch track supplies the right of way therefor over its property and that of third parties, and also pays all maintenance charges (A. 76; See Pet. Ex. 19, A. 106).

(2) *Procedure Followed by Appellant.*

It is urged in appellees' statement that having submitted to the jurisdiction of the Illinois Commerce Commission, appellant is estopped to deny the authority of the Commission to enter an order in the exercise of the jurisdiction which appellant invoked. It is suggested that if appellant is right in its present contention, it could have

discontinued service over the track without authority of the Commission.

Under Section 49-A, Illinois Public Utility Act (Chapter 111⅔ page 2489, Ill. Rev. Stat. 1937) public utilities are not permitted to abandon or discontinue any service without having first secured the approval of the Commission. Appellant's petition was filed under this section of the law. At the time it was filed, there was already pending before the Commission, a complaint made by certain appellee industries, which complaint charged a threat of the discontinuance of service over the track, and sought an order requiring that service be continued

Under Sections 80 and 81 of the same Act (Chapter 111⅔, page 2500, Ill. Rev. Stat. 1937) the penalty for any violation of the Act by a corporation is a fine of not less than $500.00, nor more than $2,000.00 for each and every offense, and in case of a continuing violation, each day's continuance thereof is a separate and distinct offense; also the officers of such corporations become liable to a fine of $1,000.00 and imprisonment for one year. Thus, if appellant had discontinued service over the track here involved without authority of the Commission, it and its officers would have been subject to the penalties prescribed by Illinois law, unless it had been able to make good the argument which it now presents. In the event of a failure to make that argument good, appellant would find itself in the position of the appellant in *Wadley Southern Railway Co.* v. *Georgia*, 235 U. S. 651. There is no requirement that appellant assume this risk.

Moreover, such action would have been improper under decisions of this court. In *Western & Atlantic Railroad* v. *Public Service Commission*, 267 U. S. 493, the railroad company discontinued a service without application to the state Commission, although the Georgia law required such an

application. The Commission thereafter making an order, the suit was to enjoin the enforcement thereof. Sustaining the order, this court (p. 496) designated the action of the railroad company as being arbitrary and defiant. *Natural Gas Pipe Line Co.* v. *Slattery*, 302 U. S. 300, involved the same Public Utilities Act of Illinois to which we have referred. In that case the order of the lower court, denying an application for an interlocutory injunction, was sustained upon the ground that the administrative remedies afforded by the Illinois law had not been exhausted by appellant. On this point see also *Texas & Pacific R. Co.* v. *Gulf etc. Railway*, 270 U. S. 266, 279, and *Piedmont etc. Railway* v. *Commission*, 286 U. S. 299.

Appellant has consistently followed an orderly procedure in trying out the question here involved. It first went to the Commission as required by law; appealed the order of the Commission to the Circuit Court of Cook County, and then took a further appeal to the Supreme Court of Illinois. It has exhausted its remedies in those forums, and its only present recourse is to this court. All considerations demonstrate the propriety of handling the matter in this manner. An arbitrary discontinuance of service by appellant, upon the assumption that any order requiring such service to be continued would be unlawful, would not only have exposed appellant to the possibility of exceedingly heavy penalties, but would have been arbitrary and defiant of Illinois authority, and would have imposed substantial loss upon the industries now served by the track involved. In fairness, those industries deserved an opportunity to retain the service, if it is sufficiently desired by them to warrant them in making the necessary expenditures to maintain the track.

McDonald v. *Oregon Navigation Co.*, 233 U. S. 665, does not sustain appellees' contention on this point. That was

an equity suit by the railroad company to enjoin interference with certain property which it claimed to own. Instead of taking the position that the court did not have jurisdiction, and attempting to defeat the action on that ground, the defendant came into court and asked for affirmative relief. Having failed to secure the relief requested, it was properly held that the defendant could not then deny the power of the court to grant that relief. In the case at bar, the procedure to be followed by appellant was set out in the appropriate statute, and there would have been no excuse for the disregard of that procedure and the arbitrary abandonment of service by appellant.

Appellant has never claimed that the Illinois Commerce Commission did not have jurisdiction of the matter. Appellant's claim before the Commission was that under the facts and the law, the only proper order the Commission could make was one in accordance with the request of petitioner. Such a claim is not equivalent to a claim that the Commission had no jurisdiction to enter any order at all.

(3) *The Law of Illinois with Respect to Switch Tracks.*

In the third section of their statement, appellees argue that under the law of Illinois, a switch track constructed across public streets or highways and connected with the main line of the railroad is a part of such railroad and is subjected to public use. The last decision on the subject is that in the *Von Oven* case, 317 Ill. 334, cited by appellees. Reviewing the earlier decisions, the court said at page 344—

> "We are of opinion that the rational meaning and effect of the decisions are, that a railroad company and the private owner of an industry cannot by any agreement or arrangement between themselves build a switch track and limit its use to certain shippers, but when it is constructed it is open to public use and

> regulation without regard to who paid the cost of construction. The law requires the railroad company with which it connects to so operate it and for that purpose regards it as the track of the railroad company. * * *"

It will thus be seen that switch tracks constructed by shippers have not been heretofore considered, for all purposes, as parts of the railroad with which they connect. They have only been held to be so for purposes of use and regulation.

In the case at bar, however, it has been held that such a switch track is not only subject to public use and regulation, but is so much a part of the railroad with which it connects, that such a railroad, although not owning the track, is required to assume all the burdens of such ownership. It is the declaration of this rule of local law which justifies the appeal herein.

(4) *The Obligation of Appellant, under Illinois law, to Maintain the Track here Involved.*

In the fourth section of their statement, appellees argue that appellant, having the possession and exclusive use of the track in question, is under a legal obligation to maintain the track and keep it in repair. A number of Illinois cases are cited in this connection, but it is not necessary to discuss them, as none of them have application to the case at bar. The decision in the case at bar is the only one of its kind in Illinois, and it, of course, does impose upon appellant the burden of maintaining the track, in question.

It is incorrect to say, however, that appellant has possession of the track involved. It has, perhaps, the obligation to use the track, so long as it is physically capable of being operated, for the purpose of giving service to appellees, but that is all. The track still belongs to one or more of the industries served thereby, and presumably could be

taken up and removed by them, if the necessity for railroad service disappeared.

(5) *Previous Decisions of this Court.*

Appellees argue in the fifth section of their statement that the question presented in this appeal is foreclosed by previous decisions of this Court, and four cases decided by this Court are cited in support of that statement. Three of these cases were cited in paragraph 5 of appellant's statement of the basis upon which this Court has jurisdiction upon this appeal to review the judgment of the Supreme Court of Illinois. In none of the cited cases is there any language which can be construed as supporting the conclusion reached by the Supreme Court of Illinois. On the contrary, all of the decisions cited indicate a contrary view, these matters being pointed out in appellant's jurisdictional statement.

Thus in the *Union Lime Co.* case, 233 U. S. 211, the track involved was to be owned by the railway company, and this Court pointed out (p. 222) the distinction between spurs owned and operated by a common carrier under its public obligation, and private sidings. In the *Ochs* case, 249 U. S. 416, it was also said (p. 419) that the track there involved was to be the property of the railroad company and wholly under its control. In the *Lake Erie & Western Railroad Co.* case, 249 U. S. 422, the track involved was to be owned by the railroad company, which, as held by this Court (p. 425) would be entitled to make a reasonable charge for its use. In the *Western & Atlantic* case, 267 U. S. 493, the switch track involved was presumably built and owned by the railroad, since as stated by this Court (p. 494) it was entirely upon the railroad right of way.

There is nothing in these decisions indicating that a railroad company may be required to maintain at its own ex-

pense switch track not constructed by it, now owned by it, and not located upon its right of way. The only inference to be drawn from the decisions is that in the absence of such ownership and the rights deriving therefrom, such a burden may not be cast upon a railroad.

Under Illinois law, a railroad cannot be required to construct a switch track off its right of way. Its only obligation under that law is to construct upon its right of way, with approval of the Commerce Commission, a connection with a switch track constructed by shippers or consignees off the railroad right of way. And upon the construction of such a track by a shipper, another may use it only if he pays a proper part of the cost of construction (Sec. 45, Ch. 111⅔, Ill. Rev. Stat. 1937; Sec. 181, Ch. 114, Ill. Rev. Stat. 1937). The statutory provisions relating to this subject were considered in *Terminal Railroad Association* v *Cain-Hurley Lumber Co.*, 241 Ill. App. 364, in which case it was held that neither at common law, nor under statute was there any obligation on the part of a railroad company to construct track off its right of way. It is also true that under Illinois law, a railroad company has no right to condemn property for the purpose of switch or side track construction. *Limits Industrial R. Co.* v. *American, etc., Works*, 321 Ill. 101, 107.

Thus, appellant could not have been required to build the track here involved, and could not have condemned a right of way for that track even if it had desired to do so. It is true that under decisions of the Supreme Court of Illinois, it has been held that a switch track of the sort here involved, when once constructed by a shipper and connected with a railroad main line, becomes a track open to use by the public and subject to public control. Decisions of this sort are *C. C. C. & St. L. R. Co.* v. *Commerce Commission*, 315 Ill. 461, 474; *St. L. S. & P. R. Co.* v. *Commerce Commis-*

sion, 309 Ill. 621, 625, 628; *Public Utilities Commission* v. *Smith*, 298 Ill. 151, 157; *Public Utilities Commission* v. *Kuhn*, 296 Ill. 513, 515; and *Public Utilities Commission* v. *L. E. & W. R. Co.*, 277 Ill. 574, 582; 249 U. S. 422.

In many of these cases, however, the track involved was one constructed by the railroad, owned by it, and located upon its right of way; and in every case it was only held that such a track became part of the railroad with which it was connected for purposes of use and regulation by the public. In no decision prior to the decision in this case, was it held that obligations of a railroad with respect to service and regulation included also the obligation to maintain property owned by others.

Appellant contends that since, under Illinois law, the obligation of a railroad to give service off its right of way cannot and does not arise until the shipper has constructed a track for the purpose, the obligation does not continue beyond the time during which the track is maintained by the shipper in a physical condition which permits the giving of the service. Appellant further contends that the requirement of the Illinois Commerce Commission, upheld by the Supreme Court of Illinois, imposes upon it an obligation which goes beyond its agreement and the dedication of its property to public use; that this requirement compels it, in effect, to extend its railroad beyond the limits of its own right of way, although not securing thereby any rights of ownership in such extended line, and thus imposes upon it burdens in violation of its rights in the federal Constitution.

The question here involved is one of major importance, both to amounts and principle. The annual expenditure required in the case of the track under consideration is by no means insignificant. Appellant has hundreds of instances in Illinois of switch tracks connecting with its rails, but

not owned by it or upon its property, and which switch tracks are now maintained by the industries owning the tracks and being served over them. Under the rule announced by the Supreme Court of Illinois in this case, the future burden of such maintenance will, in the case of each such track, be cast upon appellant. Every other railroad operating in the State will be in the same situation.

It may not be doubted that the right of ownership of railroad property is entitled to the protection of constitutional guarantees. *Western Union Telegraph Company* v. *Pennsylvania Railroad*, 195 U. S. 540, 570; *Atlantic Coast Line Railway Company* v. *Commission*, 206 U. S. 1, 20; *Missouri Pacific Railway Company* v. *Nebraska*, 217 U. S. 196, 206; *Northern Pacific Railway* v. *North Dakota*, 236 U. S. 585, 595. The rule has been applied in a variety of ways. *Missouri Pacific* v. *Nebraska*, 164 U. S. 403; *C. B. & Q. Railroad* v. *Chicago*, 166 U. S. 403, 417; *C. B. & Q. Railroad* v. *Commissioners*, 200 U. S. 561; *C. M. & St. P. R. Co.* v. *Wisconsin*, 238 U. S. 491.

In this case, appellant is compelled to spend its money in discharging the obligations of others and to supply facilities which should be supplied by others. It is required to do more than it has engaged to do as a common carrier. It is required to assume the financial burdens of ownership without having that ownership. We submit that it may not be required to do so under the decisions of this Court. The decisions in *I. C. C.* v. *Oregon Washington R. Co.*, 288 U. S. 14, 33, 41; *Atchison, etc., R. Co.* v. *Railroad Commission*, 283 U. S. 380, 395, 396, and *Missouri Pacific R. Co.* v. *Nebraska*, 217 U. S. 196, 207, are conclusive on the subject.

Conclusion.

We submit that under the facts in the law, the federal question here involved is certainly substantial enough to justify this Court in passing upon it. So far as we know there is no decision of this or any other Court imposing upon a railroad company the obligation of maintaining track not constructed by it, ~~now~~ owned by it and not on its property, in order that the owner may receive the benefits of railroad service by means thereof.

Appellees apparently rest under the impression that the continued maintenance and operation of the track here involved by appellant will be a tremendous benefit conferred upon appellant. It is argued that appellant should not receive the benefits accruing from the operation of the track and yet escape the obligation to maintain it. The record does not show that appellant receives any profit or other benefit from the operation of the track. The relative benefit to the parties would seem to be indicated by their position in this case, appellant seeking to abandon service, if the industries will not maintain the track, and the industries insisting upon continued operation.

Appellees fail to distinguish between track owned by appellant and supplied by it in pursuance of its public obligations, and track constructed by individual industries for their own benefit and operated in their exclusive interests. If appellant is wrong in the contention which it now makes, then any shipper constructing switch track, as he would be required to do under the law of Illinois, may automatically extend the line of an existing railroad against its will, by connecting his switch track with such railroad. This action would impose upon the railroad the burden of maintaining and operating such track, but without conferring upon it all benefits which might accrue from ownership.

The record in the case at bar shows that at the present time the track involved is in need of substantial repairs and that some portion of the amount thus spent should be charged to capital account under the accounting of the Interstate Commerce Commission (A. 110, 111). But such a charge cannot be made, since the track does not belong to appellant. Again, appellant having made such improvements in the track, the four industries now served thereby may conclude that they no longer need service over the track. Having so concluded, we know of no reason why the track could not be taken up and ownership of all materials in the track assumed by the owner; any amount spent by appellant in capital improvements thus becoming an enforced gift for the benefit of the owner of the track. We submit that under the federal Constitution, appellant may not thus be deprived of its property, and that the motion to dismiss or affirm should be denied.

SILAS H. STRAWN,
FRANK H. TOWNER,
Counsel for Appellant.

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OCTOBER TERM, A. D. 1938.

No. 231

THE ALTON RAILROAD COMPANY,
Appellant,

vs.

ILLINOIS COMMERCE COMMISSION, EX REL.,
MOULDING-BROWNELL CORPORATION, ET AL.,
Appellees.

BRIEF FOR APPELLANT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1938.

No. 231.

THE ALTON RAILROAD COMPANY,
Appellant,

vs.

ILLINOIS COMMERCE COMMISSION, EX REL.,
MOULDING-BROWNELL CORPORATION, ET AL.,
Appellees.

BRIEF FOR APPELLANT.

MAY IT PLEASE THE COURT:

This case comes to this Court on appeal from a decision of the Supreme Court of the State of Illinois, which decision affirmed an order of the Circuit Court of Cook County, Illinois, upholding an order of the Illinois Commerce Commission (hereinafter called the "Commission"). The order of the Commission, entered in two proceedings before it, requires appellant to assume the future expense of maintaining a certain switch track located in the City of Chicago and connected with the main line of the appellant, which switch track was not constructed by appellant, or at its expense, is not located upon property owned by appellant and is not owned by appellant.

1. Reference to Official Report of Opinions Delivered in the Courts Below.

The opinion of the Supreme Court of Illinois in this case is officially reported at 368 Ill. 584, 15 N. E. (2nd) 508, and appears in the printed record at pages 129 to 132, inclusive. That court made no findings of fact and stated no conclusions of law additional to those contained in its opinion. The opinion was handed down on April 20, 1938, and on June 15, 1938, that court denied appellant's petition for rehearing (R. 134). The Circuit Court of Cook County wrote no opinion in the case, confining itself to the entry of an order sustaining the order of the Commission (R. 126).

The two cases before the Commission, which were consolidated by it, were entitled *In the Matter of the Petition of The Alton Railroad Company for an Order authorizing the Abandonment and Discontinuance of Service by it over a switch track serving various industries in Chicago, Illinois,* Docket No. 24391, and *Moulding-Brownell Corporation* v. *The Alton Railroad Company,* Docket No. 22201. The report and order of the Commission, sustained by the Illinois courts and here involved, was made on March 24, 1937, is reported in Vol. 16 of the Illinois Commerce Commission Reports, at page 857, and appears in the printed record at pages 2 to 34.

2. Statement of the Case.

One proceeding before the Commission was initiated by a petition filed with the Commission on February 13, 1934, under its Docket No. 22201, by the Moulding-Brownell Corporation (hereinafter called "Moulding-Brownell") and E. Heldmaier, Inc. (hereinafter called "Heldmaier") in which petition appellant was named as a defendant (R. 36, *et*

seq.). In this petition it was alleged in substance that the petitioners were served by a switch track connected with appellant's line; that appellant had threatened to discontinue the payment of certain ordinance fees, charged by the City of Chicago for the maintenance of the track over public streets and alleys, unless it was reimbursed therefor, and would thereby lose the right to operate over the track; that Moulding-Brownell and Heldmaier would thus be deprived of service and would lose their investments in their plants.

This petition further alleged appellant's obligation to make the payments necessary to properly maintain the track and prayed for an order commanding appellant not to abandon the track and requiring it to continue transportation service thereover. No answer to this petition was filed. Hearings upon the petition were had by the Commission, and the record closed before it (R. 51).

Before any decision was announced in that case, appellant filed its petition with the Commission on March 11, 1936, under the Commission's Docket No. 24391. In this petition (R. 52, *et seq.*) it was alleged, in substance, that appellant and its predecessors had operated over the switch track involved for many years, under contract, for the purpose of serving the Peoples Gas Light & Coke Company (hereinafter called the "Gas Company"), the Commonwealth-Edison Company (hereinafter called the "Edison Company"), Heldmaier and Moulding-Brownell; that from 1903 to 1923 the fees fixed by the ordinances of the City of Chicago, for the maintenance of the track across public streets and alleys, had been paid by those industries, but that from 1923 to the date of the petition, all license fees and costs of maintaining the track had been paid by appellant and its predecessors under a promise of adjustment by the industries.

It was further alleged that no such adjustment had been

made; that appellant had, therefore, cancelled the contract under which it had operated the track, and would make no further payments to the City of Chicago; that it did not own the track or the premises upon which the track was located, and was under no legal obligation to continue to make any further expenditures for maintenance of the track or in payment of any license fees. This petition further alleged an unlawful discrimination in any requirement that appellant continue to make such expenditures, and prayed an order requiring the industries to pay the future costs of maintaining the track and all fees exacted by the City of Chicago for its occupancy of public streets and alleys, and that in default of such payments, appellant be authorized to discontinue service over the track and cancel its rates on traffic to and from the industries served thereby. No answer was filed to this petition.

Hearings on the latter petition were had before the Commission, at which time a motion was made that the case made by the petition of appellant be consolidated with the case made by the petition of Moulding-Brownell (R. 56). After the hearings on the petition filed by appellant were completed and the case submitted, the Commission on October 29, 1936 entered an order in the two cases consolidated (R. 109). On November 28, 1936 appellant filed with the Commission a petition for rehearing in the consolidated cases, which was granted on December 9, 1936 (R. 109).

Additional evidence was then introduced (R. 110, *et seq.*), and on March 24, 1937 the Commission made a second order in the consolidated cases, which order rescinded the prior order of October 28, 1936. The order dated March 24, 1937 (R. 2, *et seq.*) is the one involved in this case. No petition for rehearing was filed by appellant after the order of March 24, 1937, was entered, as the Illinois statute (Ill. Rev. Stat. Ch. 111⅔, Sec. 71) only permits one rehearing in any case before the Commission.

There is little dispute in the facts developed before the Commission. Those facts are that appellant is the assignee of the purchasers at judicial sale of the railways and properties of The Chicago and Alton Railroad Company (hereinafter called the "Consolidated Company") (R. 77). The Consolidated Company was formed in 1906 by the consolidation of the old Chicago and Alton Railroad Company (hereinafter called the "Railroad Company") and the Chicago and Alton Railway Company (hereinafter called the "Railway Company") (See Pet. Ex. 20, R. 107). Receivers for the Consolidated Company were appointed on August 30, 1922, by the District Court of the United States for the Northern District of Illinois, Eastern Division, and the property remained in receivership until July 18, 1931, when appellant took over its ownership and operation (R. 77).

The entire switch track here involved, together with the spur tracks leading from it, as they now exist, are shown in yellow and white lines upon Petitioner's Exhibit 1, a map attached to the petition filed by appellant with the Commission in its Docket No. 24391 (R. 57). This map is reproduced facing page 59 of the record in this Court. The part of the track particularly involved is shown in yellow on the map, and lies between appellant's right-of-way line and the west side of Loomis street. It is 2681 feet in length.

The Gas Company has always maintained that portion of the track shown in yellow and lying west of the west side of Loomis street, since that portion of the track is owned by it and lies within its plant (R. 87, 120). Moulding-Brownell and its predecessor, the American Sand and Gravel Company, own and have always paid for the maintenance of the two spur tracks shown in white and serving Moulding-Brownell (R. 69), under provisions of the agreements relating to these spurs (Pet. Ex. 9, R. 102; Pet. Ex. 12, R. 104). Although no agreement covering the construc-

tion and maintenance of the spur serving Heldmaier could be found (R. 90), that company owns and has always paid for the maintenance of the spur shown in white and serving its property (R. 69). Appellant owns and concedes its obligation to maintain that portion of the track shown in yellow and lying within the limits of its right of way (R. 69).

It is not known when the construction of the track was started, but certainly it was prior to 1884 (R. 59). Since then it has been extended to the west and spur tracks have been constructed extending from it and serving various industries. The industries now served are the Gas Company, Moulding-Brownell, which is the successor of the American Sand and Gravel Company, Heldmaier, and the Edison Company, which is the successor of the Commonwealth Electric Company (R. 57, 59). By 1885 the track had been constructed across Hickory (Hillock) Street to Lot 3 in Blocks 3 and 4 and extended west from that point north of and parallel to Cologne Street to Loomis Street, which was then known as Deering Street (R. 60). In 1887 it was extended across Loomis Street into a plant of the Gas Company, which was located immediately west of Loomis Street (R. 71).

The spur serving Heldmaier was apparently constructed in 1894 (R. 61), but no agreement could be located under which this construction was carried out (R. 90). Under agreement dated November 15, 1900, between the Railway Company and the Gas Company (Pet. Ex. 2; R. 97), the track was extended from Lot 3 in Blocks 7, 8 and 9, where it then ended, across Lots 4, 5 and 6 in the same block to its present terminus (R. 64). On November 2, 1903 an ordinance (Pet. Ex. 3; R. 97-99) was passed by the City Council of Chicago requiring the elevation of a portion of the track, and thereafter, in accordance with the requirements of that ordinance, the track was elevated across Stark

Street, Mary Street and Hillock (Hickory) Street and two intervening alleys (R. 64, 76).

This work was done at the expense of the industries under an agreement (Pet. Ex. 4; R. 99) dated November 1, 1904, between the Railway Company, the Gas Company and the Commonwealth Electric Company, predecessor of the Edison Company (R. 64). This agreement provided for the assignment of the 1903 ordinance to the Gas Company and the Electric Company, reciting that that ordinance was secured for their benefit, and this assignment was made (Pet. Ex. 6; R. 101). In 1924 (R. 66) and 1932 (R. 67) the two spurs now serving Moulding-Brownell were constructed, the work being done under an agreement of April 5, 1924 (Pet. Ex. 9; R. 102) between the Receivers of the Consolidated Company and the American Sand and Gravel Company, and under an agreement of April 7, 1932 (Pet. Ex. 12; R. 104) between appellant and Moulding-Brownell. As a matter of fact, the agreement of April 7, 1932 was never executed by appellant.

No evidence was available as to who maintained this track prior to November 1 1904. From that date to March 26, 1936, appellant and its predecessors in interest have operated over the track and borne all the cost of maintaining that portion of the track shown in yellow on Petitioner's Exhibit 1 extending from Stark Street, where it joins the main line of appellant, up to the west side of Loomis Street (R. 69). This expenditure was assumed by appellant and its predecessors under the agreement dated November 1, 1904, between the Railway Company, the Gas Company and the Commonwealth Electric Company (Pet. Ex. 4; R. 99), the operation over the track by appellant and its predecessors being authorized by the same agreement (R. 72, 100). The term of that agreement was fixed in paragraph 3 thereof at five years, and thereafter until terminated. On March

26, 1936, appellant filed in the District Court of the United States in Chicago, its election not to assume the contract (R. 67; see Pet. Ex. 15; R. 105).

The right to make this election was conferred upon appellant by the Final Decree entered in the receivership proceedings involving the Consolidated Company (Pet. Ex. 20; R. 105). Since March 26, 1936, appellant has continued to operate over the track and maintain all that portion of it shown in yellow upon Petitioner's Exhibit 1, and extending from the connection with appellant's line to the west side of Loomis Street, pending a final decision in this case (R. 69).

The 1903 ordinance (Pet. Ex. 3; R. 97-99) expired on November 2, 1923. During the life of this ordinance, the $300 annual fee fixed by Section 4 thereof was paid by the Gas Company (R. 77), pursuant to the provisions of the agreement of November 1, 1904 (Pet. Ex. 4; R. 99). Upon the expiration of the ordinance of 1923, an argument thereupon arose between the Receivers of the Consolidated Company on one hand, and the Gas Company and the Edison Company on the other, as to the payment of the future costs of maintaining the track (R. 78, 79), the Receivers insisting that the industries should thereafter pay this cost, and also any charges fixed by future ordinances of the City of Chicago. While this discussion was in progress, the City of Chicago, on December 10, 1924, passed another ordinance (R. 66; see Pet. Ex. 11, R. 103), authorizing the continued maintenance of the track across public streets and alleys for twenty years from November 2, 1923, but increasing the fee to $1400.00 a year, and requiring the execution and posting with the City of a bond for $10,000.00 to insure compliance with the requirements of the ordinance.

Within the time allowed by Section 8 of the 1924 ordinance, the Receivers filed an acceptance thereof (R. 82)

upon an understanding with representatives of the Gas Company and the Edison Company that the charge made by the City under that ordinance would be paid by those companies and that the whole matter would be adjusted (R. 82; 83). Notwithstanding this understanding, no adjustment was made, and the Receivers posted the bond required by the 1924 ordinance. From November 2, 1923 to November 2, 1936, they and appellant maintained this bond at a cost of $10.00 per year premium thereon (R. 77, 78).

The Receivers and appellant also paid $1400.00 per year under the 1924 ordinance for the period from November 2, 1923 to November 2, 1932 (R. 77). The Gas Company refunded to the Receivers $300.00 in each of the years 1923, 1924 and 1925 (R. 78), but except for this reimbursement, the entire expenditure has been borne by the Receivers and appellant. On May 9, 1934, by an amendment (Pet. Ex. 14; R. 104) to the 1924 ordinance, the City of Chicago reduced the $1400.00 annual charge to $700.00 per year, beginning November 2, 1932 (R. 67), and appellant paid this amount up to November 2, 1936 (R. 78).

Thus, since November 2, 1923, appellant and its predecessors, in addition to maintaining that part of the track lying east of the west side of Loomis Street, as shown in yellow on the map (R. 69) have paid $15,190.00 to the City of Chicago as compensation for its occupancy of public streets and alleys. In addition, they have, through error, paid taxes on that part of the track here involved (R. 81). No taxes were paid by appellant on the real estate under the track (R. 82), and when the error was discovered, the track itself was eliminated from appellant's tax return (R. 81). As of November 2, 1936, appellant cancelled the $10,000.00 bond on file with the City of Chicago, and since that date has not paid the premium on the bond and has not paid the $700.00 per year charge fixed by the amendment of 1934 to the ordinance of 1924 (R. 110).

It was not possible to segregate the expense incurred by appellant in past years in maintaining the track involved, but for the three years following the hearing before the Commission, the average cost of maintaining that portion of the track here involved will be approximately $4,000.00 a year, and thereafter this expense will amount to about $1,000.00 per year (R. 68, 69). The figures are shown on Petitioner's Exhibit 18 (R. 106), and were not a guess, but were based on the witness's knowledge and experience as an engineer (R. 74). The rather high cost of maintenance is due to the elevation of the track from the point where it leaves appellant's line across Stark Street, Mary Street, Hillock Street and intervening alleys to Throop Street (R. 73).

There can be no doubt that the portion of the track here involved, the spur tracks extending from it and the right-of-way, upon which all those tracks are laid, do not belong to appellant and have never belonged to it. The portion of track shown in yellow on the map and outside appellant's right-of-way, was constructed at the expense of the Gas Company, and the testimony of that company's witness is that it now belongs to the Gas Company (R. 87), which also owns and maintains the portion lying west of the west side of Loomis Street. The ownership of the spurs, extending from the track and shown in white lines on Exhibit 1, is determined by the various agreements relating to the construction of those spurs, but it is clear that neither the spurs, nor the premises upon which they are laid, belong to appellant. These spurs belong to the industries they serve and are maintained by those industries.

Twelve maps of the line of appellant and its predecessors in interest, dated from 1884 to 1904, were produced upon the hearings before the Commission. At the time these maps were made. the uniform practice was to show tracks

owned by appellant and its predecessors in red; tracks owned by others being shown in blue (R. 59). On all of the maps produced, this track, as it existed at the date of each map, was shown in blue (R. 59, 62). The original roadmaster's book of appellant and its predecessors (Resp. Ex. 1; R. 108) also lists all of this track lying outside the right-of-way of appellant and its predecessors in interest, as being track owned by the industries (R. 62, 63).

The 1903 ordinance of the City of Chicago (Pet. Ex. 3; R. 97) recites that the track is built on private property, except where it intersects public streets and alleys, and requires the projected elevation to be of a character agreeable to the owners of the property upon which the track was then located. The agreement of November 1, 1904, between the Railway Company, the Gas Company and the Commonwealth Electric Company (Pet. Ex. 4; R. 99) also recites that the Electric Company and the Gas Company are the owners of nearly all the land upon which the track is located, and the Gas Company is required to secure the consent of the owners of the other property to the elevation and operation of the track.

The uniform practice of appellant in all cases of switch track constructed by industries. owned by them and not located upon appellant's right-of-way, is to require such industries to maintain the track. The track here involved is the only instance where appellant has been required to maintain switch or other track not owned by it and not located upon its right-of-way (R. 70, 71). In some cases, industries are required to pay for the maintenance of switch tracks even though they are owned by appellant and are partly on its right-of-way, and in all cases where such tracks cross public streets, the industries secure such rights as may be necessary (R. 96). Examples of this situation are the switch tracks serving four competitors of Moulding-

Brownell in Chicago (R. 95, 96). The industries served by these tracks compete with Moulding-Brownell (R. 94), yet rest under the necessity of maintaining the tracks serving them, while Moulding-Brownell is free of such obligation.

At Chicago, Wann, Springfield, Carlinville and Coal City, Illinois, appellant has switch tracks comparable in length with the track here involved, each such track having spurs extending from the switch track into adjacent industries (R. 112). In none of these instances does appellant maintain any portion of such tracks not owned by it and not on its right-of-way. In some cases appellant does not even maintain track owned by it if such track is not on its right-of-way. In any event, appellant's expenditures for maintenance are confined to track owned by it and located on its right-of-way (R. 112, 117, 118). The tracks involved at the points named differ from the one here involved only in the respect that greater parts of them are owned by appellant and are located upon its right-of-way.

Appellant has a standard form of switch track agreement, which is generally used in connection with the construction and maintenance of switch track (R. 70), which form was introduced in evidence (R. 85; See Pet. Ex. 19; R. 106). Under this agreement, the industries served by a switch track supply the right-of-way therefor over their own property and that of third parties, and also pay for any maintenance or repair work done on the track by appellant. This has been a requirement since 1905 (R. 74). Appellant does not ordinarily construct a switch track for more than one industry. If another industry locates on a constructed track, the matter is adjusted as between the industries (R. 76).

In the case of the track here involved, when maintenance work is required on the portion now maintained by appellant, substantial amounts will be expended, which, under the accounting rules of the Interstate Commerce Commis-

sion, should be charged to additions and betterments. Such charges will be due to the use of heavier rail, creosoted timber and additional ballast, the cost thereof over the cost of replacing what is now in the track being considered as an addition to property (R. 110, 111). Such charge could only be made, however, if appellant owned the track. Since it does not, the charge cannot be made in this fashion, although it is proper.

All of the track here involved is required to serve the Gas Company, Moulding-Brownell and Heldmaier (R. 86, 92). The Edison Company does not now receive service over the track (R. 75). The estimated gross revenue of appellant on traffic handled over the track in 1934 was about $40,000.00, although no study was made to determine the net revenue (R. 80). The rates to the industries are on the Chicago basis and could be cancelled merely by eliminating the industries from the Directory of Industries (R. 83, 84). The Moulding-Brownell plant was said to be worth either $350,000.00 (R. 38, 40) or $100,000.00 (R. 91), and the Heldmaier plant to be worth about $50,000.00 (R. 38).

The estimated gross revenue said to have been received by appellant on traffic to and from Moulding-Brownell, as stated by that company, was $37,243.00 in 1933; $25,124.00 in 1934 and $26,612.00 in 1935 (Respondent's Ex. 2; R. 108), but these figures are only estimates (R. 93). Practically all of appellant's revenue, shown on that exhibit was switching revenue, appellant maintaining the track for the benefit of other carriers who get the line haul on traffic to and from Moulding-Brownell.

In its order of March 24, 1937 (R. 2, *et seq.*), the Commission finds the facts to be as we have stated them, there being no material controversy with respect thereto. In fact, the Commission assumed that the facts were as alleged by appellant in the petition filed by it in Docket 24391 (R.

12). In its discussion of the facts, the order states that appellant does not own the track involved or the real estate under it (R. 6, 12, 25) but it is said that the track is part of the railroad now owned by appellant (R. 17). It is further said that this track is not the kind of track ordinarily covered by appellant's standard switch track contract (R. 17); that it is more comparable to the five tracks in other cities as stated in the evidence, and that the maintenance of the track by appellant would cause no unlawful discrimination (R. 18).

Following this discussion, the order contains twenty-four findings (R. 24-33) recapitulating the evidence and finding, among other things, that, although the track involved was not constructed by and is not owned by appellant, and is not located upon land owned by appellant (R. 25), it is a public track and part of the railroad facilities of appellant (R. 32); that authority to abandon the track and discontinue the rendering of transportation thereover should be denied (R. 32); that appellant should be specifically ordered and directed to continue the maintenance and operation of the track (R. 32, 33); that public convenience and necessity require such maintenance and operation by appellant, and that the order of October 28, 1936, should be rescinded (R. 33).

It is then ordered (R. 33, 34) that authority to abandon the track involved and to discontinue the rendering of transportation by means thereof be specifically denied; that appellant be specifically ordered to continue the maintenance and operation of the track and the rendering of service thereon to industries served thereby; that the order made in the two cases on October 28, 1936, be rescinded, and that jurisdiction of the proceeding and of the parties thereto be retained for the purpose of taking any further action that might appear reasonable or necessary.

3. Proceedings in the Lower Courts.

Upon the making of the order of March 24, 1937, appellant served upon the Secretary of the Commission on April 13, 1937, its notice of appeal to the Circuit Court of Cook County, and filed this notice in the Circuit Court on April 14, 1937 (R. 1, 123). In response to this notice the Commission, on April 16, 1937, filed a certified copy of the order of March 24, 1937, in the Circuit Court (R. 1, 2), and on May 3, 1937, filed in the Circuit Court the certified record of the proceedings before the Commission (R. 35).

The case was thereafter argued and submitted in the Circuit Court, and on October 9, 1937, an order was entered therein affirming, without opinion, the order of the Commission made on March 24, 1937, in the two cases before it (R. 126). On the same date, appellant filed in the Circuit Court its motion for a new trial or rehearing (R. 125). This motion was denied on October 9, 1937, exceptions being saved by appellant to both the order affirming the order of the Commission and the order denying the motion for new trial or rehearing (R. 126).

A notice of appeal by appellant from the Circuit Court of Cook County to Supreme Court of Illinois was filed in the Circuit Court on October 26, 1937, bearing acknowledgment of service thereof on opposing counsel on October 25, 1937 (R. 126, 127). The foregoing procedure was in accordance with Illinois statute, which permits an appeal from the Commission to the Circuit Court of Cook County upon filing a notice thereof and a direct appeal from the Circuit Court to the Supreme Court of Illinois (Ill. Rev. Stat. 1937, Ch. 111⅔, Sec. 72, 73).

The case was thereafter briefed and submitted in the Supreme Court of Illinois, and on April 20, 1938, that court handed down its opinion affirming the judgment of

the Circuit Court of Cook County, sustaining the order of the Commission (R. 129, *et seq.*). In its opinion, the court said (R. 131):

> "The only issue before us is whether a railroad can be compelled by the Illinois Commerce Commission to maintain a switch track built by and upon the property of the industries served by the track."

This is not quite a complete statement of the issue which we present, as it does not state the non-ownership by appellant of the track here involved. Such non-ownership by appellant was an allegation of appellant's petition filed with the Commission, and a fact proven by the evidence and accepted by the Commission in making its decision. The Supreme Court of Illinois in deciding the issue presented, held that switch tracks of this type, although constructed and owned by industries and located upon property other than that of the railroad, nevertheless, when once built, become a main part of the line of the railroad with which they connect (R. 131), and that consequently, the railroad is under a legal obligation to expend its funds in the maintenance of such track.

The court further based its decision (R. 132) upon Section 50 of the Public Utilities Act of Illinois (Ill. Rev. Stat., Ch. 111⅔, Sec. 50), which authorizes the Commission to require such additions, extensions, repairs or improvements to existing plants of public utilities as the Commission, in its judgment, thinks should be made. This section of the law, however, was not mentioned in the complaint filed by Moulding-Brownell and Heldmaier with the Commission, nor relied upon by the Commission in its order of March 24, 1937.

The court also made some errors of fact in its opinion. The agreement of 1904 (Pet. Ex. 4, R. 99) was not made by appellant, as stated in the opinion (R. 130), but by the Railway Company. Nor was it entirely performed by appel-

lant as stated (R. 130) but in successive years by the Railway Company, its successor, the Consolidated Company, the Receivers of the Consolidated Company, and appellant. The agreement, moreover, was not terminated by the Receivers as stated (R. 130) but by appellant (R. 67, 105).

Appellant's petition for rehearing in the Supreme Court of Illinois was denied on June 15, 1938 (R. 134). On July 1, 1938, an order allowing appellant an appeal to this Court (R. 135), together with a citation directed to appellees were signed by the Chief Justice of the Supreme Court of Illinois, and on the same date appellant's petition for appeal (R. 134), the order allowing appeal (R. 135), appellant's assignment of errors (R. 136), and its statement of the basis upon which this Court has jurisdiction of the appeal were filed with the Clerk of the Supreme Court of Illinois. On July 2, 1938, notice of these proceedings and of appellees' rights under paragraph 3 of Rule 12 of the rules of this Court, together with copies of the documents, was served upon counsel for appellees, and was filed with the Clerk of the Supreme Court of Illinois (See R. 139). The bond on appeal was filed on July 7, 1938.

On July 8, 1938, the citation, with acknowledgment of service on July 7, 1938, was filed, and on July 14, 1938, appellees filed with the Clerk of the Supreme Court of Illinois their motion to dismiss this appeal or to affirm the decision of the Supreme Court of Illinois, together with their statement opposing the jurisdiction of this Court, and praying that this appeal be either dismissed or the judgment affirmed, upon the ground that the question presented is so unsubstantial and frivolous as to justify such action. On July 12, 1938, there was filed with the Clerk of the Supreme Court of Illinois a stipulation with respect to the transcript of record to be certified to this Court on this appeal (R. 138).

4. Proceedings in this Court.

The record herein was filed in this Court on July 29, 1938 and on August 3, 1938 appellant filed its statement of points to be relied upon and designation of parts of the record to be printed (R. 140). On August 3, 1938, appellant filed in this Court its brief in opposition to the motion of appellees to dismiss or affirm, and on October 10, 1938, this Court entered an order herein postponing further consideration of the jurisdiction of this Court and of the motion to dismiss or affirm to the hearing of the case on the merits.

SPECIFICATION OF ERROR.

Appellant makes the following specification of error:—

(1) The Supreme Court of Illinois erred in holding that the order of the Illinois Commerce Commission here in question, requiring appellant to expend its money in the maintenance of the switch track involved did not constitute a taking of appellant's property without due process of law, in violation of appellant's rights under the Fourteenth Amendment to the Constitution of the United States, and erred in upholding and sustaining said order and in failing to reverse the judgment of the Circuit Court of Cook County sustaining said order, and in failing to reverse and set aside said order.

SUMMARY OF ARGUMENT.

I.

The motion filed herein by appellees to dismiss the appeal or to affirm the judgment should be denied. The federal question presented for decision was urged in the lower courts and was passed upon by the Supreme Court of Illinois. It is substantial and deserves the full consideration of this Court, in that the decision appealed from unquestionably takes appellant's property, is the only decision holding as it does, and involves a question of general public interest which should be determined by this Court.

II.

There can be no doubt that the order of the Commission here involved operates to take the property of appellant, in that it requires a substantial continuing expenditure by appellant upon the track in question. Such a requirement can only be sustained under the Fourteenth Amendment to the Federal Constitution if it is a valid exercise of state power.

III.

The requirements of the order here involved can only be sustained if they are reasonable, do not impose upon appellant an obligation beyond its agreement to serve the public, and are necessary in the public interest. The order does not meet any of these requirements.

1. There is no common law or statutory authority for the requirement that appellant expend its funds in the future maintenance of the track here involved. Appellant could not have been required to construct that track. The track is not now owned by appellant and is not located upon its right-of-way. Such a requirement compels, in effect, an extension of appellant's line of railroad, and thus

requires of appellant something beyond its agreement and undertaking to serve the public. Under these circumstances the order is an invalid exercise of state authority and operates to take appellant's property in violation of its rights under the Fourteenth Amendment to the Federal Constitution.

2. The order of the Commission and the decision of the lower court are grounded upon the theory that the track here involved is a public track open to use by the general public, and that by reason thereof, it is a part of appellant's railroad to such an extent as to require appellant to sustain the burden of maintaining it. This is not so under the law and the facts. On the contrary, the law imposes substantial restrictions upon the use of this track by any member of the general public and the physical location of the track is such that it is not capable of use by the general public. If appellant now desired to construct the track it could not condemn a right of way therefor. Under these circumstances, the track cannot be said to be publ. and the order of the Commission is invalid, since it requi. expenditures by appellant for the private use and benefit of the appellee industries now served by the track.

3. While there are no judicial decisions directly in point on the obligation of a railroad to maintain a track under the circumstances presented in this case, there are a number of decisions dealing with various phases of the situation presented by the case at bar. A consideration of those decisions compels the conclusion that the order of the Commission is invalid, in that it requires appellant to maintain track not constructed or owned by it and not located on its right of way.

4. The record does not show whether appellant makes or loses money in operating the switch track here involved. But the point is not important. Appellant cannot, in any case, be required to expend its funds for the use and benefit of private parties, or to undertake obligations beyond its agreement and undertaking to serve the public.

ARGUMENT.

I.

The Motion of Appellees to Dismiss the Appeal Herein or to Affirm the Judgment of the Supreme Court of Illinois.

As we have said, appellees filed in the office of the Clerk of the Supreme Court of Illinois a motion to dismiss the appeal herein or to affirm the judgment of the Supreme Court of Illinois, this motion being based upon the specific ground that the questions on which the decision herein depends, are so unsubstantial as to need no further argument. Appellant filed its brief in opposition to this motion, and this Court has postponed further consideration of its jurisdiction and of the motion of appellees to the hearing on the merits.

There can be no doubt that the question of appellant's claim of right under the Fourteenth Amendment to the Federal Constitution was presented to the lower courts and considered by them. This is conceded in the statement of appellees opposing the jurisdiction of this Court, where it is said that our claim of jurisdiction in this Court rests upon our statement, made in the state courts, that the order of the Commission constitutes a taking of appellant's property without due process of law.

The claim was presented to the Circuit Court of Cook County by motion for rehearing or reargument (R. 125), this being the first opportunity under Illinois practice (Ill. Rev. Stat. 1937, Ch. 111-⅔, Sec. 72), for the presentation of the claim. It was also assigned as error in appellant's brief filed in the Supreme Court of Illinois, that being the procedure required by Rules 36 and 39 of that court. A

copy of that brief, certified by the Clerk of the Supreme Court of Illinois, is on file with the Clerk of this Court. The assignment, appearing at page 17 thereof, reads as follows:

> "The trial court erred in failing to find that the order of the Illinois Commerce Commission, made in its Dockets 22201 and 24391, on March 24, 1937, constituted a taking of appellant's property without due process of law, in violation of its rights under * * * the Fourteenth Amendment to the Constitution of the United States."

The lower court dealt with the claim by saying (R. 132) that the order of the Commission does not violate any provision of the State or Federal Constitutions.

The motion to dismiss or affirm first argues that by proceeding before the Commission, appellant waived its right to appeal to this Court. The argument was answered at pages 3 to 6, inclusive, of appellant's brief in opposition to the motion and is clearly without foundation. Appellant followed the procedure prescribed by state law (Ill. Rev. Stat. 1937, Ch. 111⅔, Sec. 49a), and was not required to assume the chance of liability which might have resulted from other action. *Wadley Southern R. Co.* v. *Georgia*, 235 U. S. 651.

Appellant's procedure was in accordance with the decisions of this Court, *W. & A. R. Co.* v. *Commission*, 267 U. S. 493, 496; *T. & P. R. Co.* v. *Gulf etc. R. Co.*, 270 U. S. 266, 279; *Piedmont etc. R. Co.* v. *Commission*, 286 U. S. 299; *Natural Gas etc. Co.* v. *Slattery*, 302 U. S. 300. In *Myers* v. *Bethlehem etc. Corp.*, 303 U. S. 41, it was sought to enjoin the National Labor Relations Board from holding a hearing, the claim being that irreparable injury would be inflicted on the plaintiff if such a hearing were held. This Court said, at pages 50 and 51:

> "The contention is at war with the long settled rule of judicial administration that no one is entitled to ju-

dicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."

In conformity with the rule thus stated, appellant exhausted its administrative remedy before the Commission, and also pursued all the rights accorded it by Illinois law. It only comes to this Court on a claim of denial, by state authority, of its rights under the Federal Constitution.

The claim of appellees that the questions presented herein by appellant are so unsubstantial as to need no further argument brings in question the entire merits of the case. It is true that this Court will decline jurisdiction whenever it appears that the constitutional question raised on appeal, or by writ of error, is not substantial in character. Such a question may be unsubstantial because of previous decisions, as in *Zucht* v. *King*, 260 U. S. 174, 176, or because the question is so wanting in merit as to be frivolous, as in *Pennsylvania Co.* v. *Donat*, 239 U. S. 50. It is also clear that in order to invoke the jurisdiction of this Court, the controversy must be a real and substantial one, deserving serious consideration, and something more than a mere assertion of a claim in respect to some constitutional right. *U. S. Fidelity Co.* v. *Oklahoma*, 250 U. S. 111, 112.

If, however, the federal question is one which requires analysis and exposition for its decision, it cannot be said to be frivolous, *Milheim* v. *Moffat Tunnel District*, 262 U. S. 710, 716, 717, and a motion to dismiss an appeal for want of a substantial federal question will be denied if this Court is unable to say that every question in the case is so utterly lacking in merit as to require dismissal for lack of substance. *Hamilton* v. *Regents*, 293 U. S. 245, 258. A determination of the motion of appellees to dismiss or affirm requires, therefore, some consideration of the merits of the questions presented herein for decision.

Those questions are discussed in this brief, and we sub-

mit the discussion demonstrates that the federal questions here involved are so substantial in character as to justify the full consideration of this Court, and the denial of the motion to dismiss or affirm. We have found no decision of any court sustaining the rule of law announced by the Commission and sustained by the lower court. That rule goes far beyond any prior decision of the Illinois courts. And the question for decision is one of substantial public interest, which should be decided by this Court.

II.

It Is Clear that the Order of the Commission Constitutes a Taking of Appellant's Property, and Can Only Be Justified If It Is a Valid Exercise of State Authority.

It may not be disputed that the order of the Commission does constitute a taking of appellant's property, in that the order requires appellant to expend its money in the maintenance of the track here involved. From November, 1903, to November, 1923, appellant did maintain the track at its expense, under agreement with the Edison Company and the Gas Company (Pet. Ex. 4, R. 99). Under that agreement appellant and its predecessors were compensated for their expenditures in maintaining the track through the assumption by the industries of the cost of elevation (R. 74), and by a grant of the exclusive right to operate over the track. From November, 1923, until March 24, 1937, the date of the Commission's order, appellant also maintained the track at its expense, but did this at first because of the pending negotiations with the industries (R. 77-80), and thereafter because of the Illinois law prohibiting a discontinuance of service, which would have been forced by a lack of maintenance, without a permissive order of the Commission (Ill. Rev. Stat. 1937, Ch. 111⅔, Sec. 49a). Since March 24, 1937, appellant has

been required to maintain the track by the order of the Commission.

The record is clear in showing that for the three years following the hearings before the Commission, appellant will be required to expend approximately $4,000.00 a year in maintenance, and that thereafter this expense will be approximately $1,000.00 a year (R. 68, 69, 73, 74). In addition, appellant may be required to pay the license fees fixed by ordinance of the City of Chicago for the maintenance of the track over public streets and alleys (Pet. Ex. 14, R. 104). The annual fee is $700 per year, and while the issue of appellant's obligation to make this payment subsequent to November 2, 1936, when appellant ceased paying (R. 78), was not determined by the Commission (R. 21) or by the Supreme Court of Illinois (R. 130), it is nevertheless clear that any such payments subsequently required to be made, will have to be made by appellant if the Commission's order is valid.

There must be some legal justification for this taking of appellant's property. Certainly, the right of ownership of railway property, which must include money, is entitled to the protection of constitutional guarantees. *Reagan* v. *Farmers Loan etc. Co.*, 154 U. S. 362, 399; *Mo. Pac. R. Co.* v. *Nebraska*, 164 U. S. 403, 417; *Western Union Telegraph Co.* v. *Pennsylvania R. Co.*, 195 U. S. 540, 570; *Atlantic Coast Line R. Co.* v. *Commission*, 206 U. S. 1, 20; *Mo. Pac. R. Co.* v. *Nebraska*, 217 U. S. 196, 206; *Northern Pacific R. Co.* v. *North Dakota*, 236 U. S. 585, 595. In the *Railroad Commission* cases, 116 U. S. 307, a suit to enjoin the operation of a state statute regulating railroad rates, this Court said with respect to the powers of a state under the Fourteenth Amendment, page 331:

> "From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a

> power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

While a state has the right to regulate the local affairs of railroads lying within its border, such right of regulation, no matter what form it takes, cannot be relied upon as a justification for a violation of a railroad's rights under the Federal Constitution. *C. B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 236; *C. M. & St. P. R. Co.* v. *Wisconsin*, 238 U. S. 491, 501. Nor can confiscation be successfully disguised as regulation, *A. C. L. R. Co.* v. *Commission*, 206 U. S. 1, 20; and the public interest cannot be made to serve as an excuse for an invasion of constitutional rights. *Northern Pacific R. Co.* v. *North Dakota*, 236 U. S. 585, 595.

Missouri Pacific R. Co. v. *Nebraska*, 217 U. S. 196, is a case much like the case at bar. In that case the Railroad Company was required to build and maintain a side track to serve an elevator, the requirement being based upon a state statute. Recognizing the right of the state to require a railroad to do what was reasonably necessary to serve the public in the way in which it had undertaken to serve it, this Court, nevertheless, said at page 206:

> "But railroads after all are property protected by the Constitution, and there are constitutional limits to what can be required of their owners under either the police power or any other ostensible justification for taking such property away."

In *I. C. C.* v. *Oregon etc. Co.* 288 U. S. 14, this Court said at page 41:

> "The railroads, though dedicated to a public use, remain the private property of their owners, and their assets may not be taken without just compensation."

The fact of the taking of appellant's property not being

open to question, it only remains to be seen whether such taking is justified under the law.

III.

The Order of the Commission Is Not a Valid Regulation Within the Limits of State Authority. It Imposes on Appellant Obligations Beyond Appellant's Agreement and Undertaking to Serve the Public, and Operates to Take Its Property Without Due Process of Law in Violation of Its Rights Under the Federal Constitution.

It is well settled that a state has power to make reasonable regulations with respect to the operation of railroads within its borders. This right has been recognized in many decisions of this Court to which it is unnecessary to refer. The question involved in each case is whether that power has been duly and properly exercised. *Wisconsin etc. R. Co.* v. *Jacobson*, 179 U. S. 287, 297. In *Oregon etc. R. Co.* v. *Fairchild*, 224 U. S. 510, it was said at page 524, that the propriety of a taking of railroad property under administrative regulation must

> "be tested by considering whether, in view of all the facts, the taking was arbitrary and unreasonable or was justified by the public necessities which the carrier could lawfully be compelled to meet."

In *Great Northern Ry. Co.* v. *Minnesota*, 238 U. S. 340, the Court quoted the *Fairchild* case, *supra*, with approval, and said at page 345:

> "The facts being established, the question then presented is whether, as a matter of law, they are adequate to support a finding of requisite public necessity—the mere declaration of a Commission is not conclusive."

In *Atchison etc. Ry. Co.* v. *Commission*, 283 U. S. 380, this Court at pages 394 and 395 mentioned many of its decisions applying the principle that a state, either directly

or through an authorized Commission, may require railroad companies to provide reasonable, adequate and suitable facilities for the convenience of its communities served by them. It was further said, however, at page 396:

> "The question in each case is whether, in the light of the facts disclosed, the regulation is essentially an unreasonable one."

Having regard to this principle of law, we contend that the requirement made by the Commission in this case is essentially an unreasonable and arbitrary requirement, not supported by law; that it imposes upon appellant obligations beyond its undertaking to serve the public; and that it constitutes an unlawful taking of appellant's property, whether the taking be for public or private purposes. These claims require a consideration of a number of circumstances.

1. We direct attention to the fact that there is no provision of any Illinois statute relating to the maintenance of switch track constructed by a shipper off a railroad's right of way and owned by that shipper; that is to say, there is no statutory authority for the requirement of the Commission that appellant maintain the track here involved. This is an important consideration.

Appellant could not have been compelled to build the switch track here involved since that track lies beyond the limits of appellant's right of way. Certainly there has never been a common law obligation upon a railroad company to construct such a track. In *Terminal Railroad Assn. etc.* v. *Cain-Hurley Lbr. Co.*, 241 Ill. App. 364, a case very similar in its facts to the case at bar, the court said at page 369:

> "At common law there was no duty on the part of a railroad company, in a case of this character, to provide a switch track connection between its main line and the premises of a person or corporation desiring the same. *Vincent* v. *C. & A. R. Co.*, 49 Ill. 33;

People v. *C. & N. W. Ry. Co.*, 57 Ill. 436; 4 R. C. L. 680, 681; 33 Cyc. 124; *L. S. & M. S. R. Co.* v. *Hoffert*, 40 Ill. App. 631."

In *Wisconsin etc. R. Co.* v. *Jacobson*, 179 U. S. 287, there was involved the requirement of a Minnesota court that two railroads construct a physical connection between their lines at a point where the lines crossed, the requirement being made pursuant to the specific provisions of a Minnesota statute. This Court sustained the requirement as a valid exercise of state power, but took occasion to say at page 296:

> "At common law the courts would be without power to make such an order as was made in this case by the state court. Legislative authority would be necessary in order to give power to the courts to render a judgment of this kind."

In *N. Y. C. R. Co.* v. *The Talisman*, 288 U. S. 239, this Court cited the *Jacobson* case, *supra*, and said with respect to the obligation of carriers to make track connections (p. 241):

> "Such carriers were not bound under the common law to make track connections."

In *Jones* v. *Newport etc. Co.*, 65 Fed. 7[illegible], it was claimed that a switch track connecting a railroad and a warehouse became, in the absence of a statutory provision, a part of the railroad; but the claim was rejected.

The Illinois statutes are equally explicit in relieving a railroad company of any obligation to construct such track. Section 5 of Article XIII of the Illinois Constitution of 1870 (Ill. Rev. Stat. 1937, page 59) reads as follows:

> "All railroad companies receiving and transporting grain in bulk or otherwise, shall deliver the same to any consignee thereof, or any elevator or public warehouse to which it may be consigned, provided such consignee or the elevator or public warehouse can be reached by any track owned, leased or used, or which can be used, by such railroad companies; and all rail-

road companies shall permit connections to be made with their track, so that any such consignee and any public warehouse, coal bank or coal yard, may be reached by the cars on said railroad."

This provision only requires a railroad company to give service over a track available for the purpose and to permit connections to be made with its track. It imposes no construction obligations upon railroads. Section 1 of an Act of June 14, 1909 (Ill. Rev. Stat. 1937, Ch. 114, Sec. 181) reads as follows.

"Any railroad being a common carrier of freight, upon application of any shipper tendering or receiving freight or merchandise in carload lots, shall construct, maintain and operate, upon reasonable terms, upon its own right of way at any regular station, a switch connection with any such shipper's railroad track which may be constructed to connect with its railroad upon its right of way, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient revenue business to such railroad company to justify the construction and maintenance of the same, and shall furnish cars for the movement of such traffic upon such switch upon its own rails to the best of its ability without discrimination in favor of or against any such shipper."

Under this provision, the maximum obligation cast upon a railroad is that of constructing, maintaining and operating a switch connection upon its own right of way. All other track referred to in the statute is to be constructed by a shipper who desires to secure service. The 1909 statute has never been specifically repealed, but Section 45 of the Public Utilities Act of Illinois (Ill. Rev. Stat. 1937, Ch. 111⅔, Sec. 45) deals with the same subject. (See appendix) This statutory provision requires a railroad company, under certain conditions, to make a connection between its main line and any track or tracks constructed by a corporation, person or municipal corporation, and further provides that under the conditions stated, the railroad shall

> "construct upon its right of way a spur or spurs for the purpose of receiving and delivering freight thereby, and shall receive and deliver freight thereby."

In none of these constitutional or statutory provisions is there any language which even infers an obligation on an Illinois railroad to construct track off its right of way. On the contrary, it is plain that the only obligation cast upon a railroad is to construct a spur or connection upon its right of way to connect with tracks which are required to be constructed by shippers, if they desire service thereon. The two statutory provisions to which we have referred were considered in *Terminal Railroad Assn. etc.* v. *Cain-Hurley Lbr. Co.*, 241 Ill. App. 364. With respect to the 1909 statute, the court said at page 370:

> "An examination of this statute clearly discloses that the duty of building service tracks, imposed on railroad companies thereby, is limited to the construction of the same on their own property. It is not made the duty of a railroad company to construct service tracks for the benefit of others, beyond its own premises. This holding is supported by authorities in other States, where similar statutes have been under consideration." (Citing cases)

With respect to Section 45 of the Public Utilities Act of Illinois, the court said at page 372:

> "However, an examination of this statute will disclose that there is no provision therein requiring a railroad company to extend its lines beyond its own premises."

It was doubtless because of this situation that the track here involved was originally constructed and subsequently extended, in so far as it lies beyond the limits of appellant's right of way, at the expense of appellees. Appellant's contribution to that construction was, in conformity with Illinois law, limited to the construction of the 150 foot connection which lies upon its right of way.

We submit that there is no essential difference between

a requirement that switch track be built, and a requirement that a carrier maintain such track after it has been built by others. If the construction cannot be required, it would seem to follow that maintenance after construction cannot be required. Every argument making against appellant's obligation to build the track here involved, is equally effective in opposition to appellant's asserted obligation to maintain the track after construction. The only inference to be drawn from the common law and the constitutional and statutory provisions relating to such track is that the owner or the industries served thereby must maintain the track in such condition that service can be given. The lower court said, referring to our argument on this point (R. 131):

> "This argument is incompatible with our repeated holdings that switch tracks of this type, once built, become a part of the main line of the railroad, whether built upon private rights of way or upon public streets."

As we have said, there is no authority in the common law or in the Illinois statutes for this holding of the lower court. It is said to be based entirely upon what the same court is said to have held in prior decisions. This is not sufficient under the decision of this Court in *Wisconsin, etc., R. Co.* v. *Jacobson*, 179 U. S. 287, 296.

Moreover, it was only held in those decisions that such switch track becomes a part of the railroad with which it is connected for the purposes of public use and control. That is to say, it was only held that a railroad could be required to give service on such track, and that such service would be subject to public regulation with respect to rates and operation. In no decision prior to the one here involved has the lower court held that such track is so much a part of the railroad with which it connects that the railroad is obliged to assume all obligations of ownership, even though it does not own the track.

Decisions referred to by the lower court are those in *Truesdale* v. *Peoria etc. Co.*, 101 Ill. 561; *Chicago Dock Co.* v. *Garrity*, 115 Ill. 155; *C. & A. R. Co.* v. *Suffern*, 129 Ill. 274; *People* v. *Blocki*, 203 Ill. 363; *Commission* v. *L. E. & W. R. Co.*, 277 Ill. 574; *Commission* v. *C. C. C. & St. L. R. Co.*, 296 Ill. 513; *Commission* v. *Smith*, 298 Ill. 151; *St. L. S. & P. R. Co.* v. *Commission*, 309 Ill. 621; and *Von Oven* v. *C. B. & Q. R. Co.*, 317 Ill. 334. In almost all of these cases, the track involved was either laid in a public street, or was upon the railroad right of way and owned by the railroad. And in each it was only held that the track was part of the railroad and a public highway for purposes of service and public regulation.

That this has been the rule is demonstrated by appellant's practice in the past. The uniform practice of appellant has been to require industries owning switch track not on appellant's right of way, to maintain such track (R. 71). Five specific examples of track comparable to that here involved were cited, all of them being maintained by the shippers (R. 112). At no time in the past has appellant maintained track not owned by it and located on its right of way (R. 71), except under special agreement, and this is the first occasion when it has been required to do so. Appellant's standard form of switch track agreement (Pet. Ex. 19; R. 106) requires the industry to supply right of way for track and pay for maintenance.

It may be that switch track such as is here involved, when once constructed and open for use, is to be considered as part of the railroad with which it connects for the purposes of use and regulation; that is to say, that a railroad company may be required to give service over it so long as it is maintained in proper condition and that the rates charged for such transportation are subject to public regulation. But we do not present that question for decision.

In this case appellant has offered to continue the service to the appellee industries if they pay the cost of properly maintaining the track here involved in its present location (R. 55). But to say that such an obligation, if it is an obligation, may be expanded into additional obligations which appellant has only hitherto sustained with respect to its own track, goes beyond all reason.

The lower court attempted to support its conclusions by referring to Section 50 of the Illinois Public Utilities Act (Ill. Rev. Stat. 1937, Chap. 111⅔, Sec. 50), which confers upon the Commission authority to make an order requiring a railroad company to make such changes, repairs, etc. in its plant as may be necessary to promote the security or convenience of the public. But this section has no application to the case at bar. There is no claim that appellant has ever failed to properly maintain the track here involved or that service thereon has been refused. At present appellant is maintaining the track and giving service thereon, in compliance with the Commission's order.

The complaint filed before the Commission by the appellee industries did not ask for an order under Section 50, nor was that section dealt with in the order of the Commission, or assigned as a ground for the order. It is only imported into the case by the decision of the lower court, and cannot serve as a justification for that decision. *Oregon etc. Co.* v. *Fairchild*, 224 U. S. 510, 525, 526; *Standard Oil Co.* v. *Missouri*, 224 U. S. 270, 281, 282.

And there is a further consideration. A railroad company has certain more or less definite public obligations which are incident to and result from its engagement and undertaking to serve the public. While it may be required to fulfill such obligations as are incident to its engagement, it cannot be required to do more, and any regulation which requires it to do more is invalid. This rule has been ap-

plied many times by this Court, particularly in connection with requirements made under state authority.

Thus, in *Great Northern Ry. Co.* v. *Minnesota,* 238 U. S. 340, the Minnesota Railroad and Warehouse Commission had entered an order directing the railway company to erect a scale in its stock yard at a local point for the purpose of securing the weights on live stock shipped from that point. The order was sought to be sustained in this Court upon the theory that the State Commission had general authority to require the railroad to build and maintain such facilities as are necessary for the public needs. This Court, however, said at page 346:

> "The demands upon a carrier which lawfully may be made are limited by its duty, and the present record conclusively shows the required structure had no direct relation thereto."

Other decisions to the same effect are *Missouri Pacific Ry. Co.* v. *Nebraska,* 217 U. S. 196, 207; *Missouri Pacific Ry. Co.* v. *Nebraska,* 164 U. S. 403; 417; *C. & N. W. R. Co.* v. *Ochs,* 249 U. S. 416, 420, 421; *A. T. & S. F. R. Co.* v. *Commission,* 160 Pac. (Cal.) 828; *Hollywood* v. *Commission,* 219 Pac. (Cal.) 983, 985.

An outstanding example of the application of this rule of law is the decision in *I. C. C.* v. *Oregon etc. R. Co.,* 288 U. S. 14. In that case the Interstate Commerce Commission had required the railroad company to build 185 miles of railroad into territory where it had not hitherto undertaken to render service. Referring to a number of previous decisions of this Court in which orders of various regulatory bodies were sustained, this Court said at page 33:

> "They were sustained, however, upon the express ground that the railroads had undertaken the service and must supply facilities adequate and reasonably necessary to its performance. The requirements were found not to involve the rendition of a new or differ-

ent service from that to which the owners had agreed when they dedicated their property to a public use. Where, however, the State's mandate involved the rendition of a service beyond the agreement of the carrier, the order was annulled."

The Court said further on the same point at pages 39 and 40:

"Wherever the State attempted to enforce a regulation or demand extension of facilities outside the company's undertaking to serve the public, the power was negatived for the very reason that the attempted exercise called on the railroad company for something beyond its agreement."

Applying the rule to the case at bar, it is clear that the Commission's order requires appellant to do more than it is required to do by virtue of its public undertaking. A railroad operating in Illinois has never before been required to expend its money in the maintenance of privately owned track, not on its right of way. The most that can be said of a railroad's undertaking under Illinois law is that it incurs an obligation to give service if track is constructed and maintained off its right of way by an industry desiring to be served, and is connected with the railway line. And so far as we know, there is no requirement under any other law that a railroad maintain track owned by a shipper and not on the railroad right of way. Every reasonable consideration supports the view that such a requirement goes far beyond the limit of a railroad's duty.

The obligation to supply the track necessary in furnishing service off a railroad right of way has always been the obligation of the industry desiring the service. As we have said, it seems only logical that an industry obliged to supply track in order to secure service should be required to maintain the track in proper condition at its own expense throughout the entire period that the service is desired. The construction of a switch track, the cost of which must

be assumed by a shipper, is but a preliminary step. It is wholly ineffective in so far as continuous service is concerned, unless the track thus constructed is maintained in such a condition that the service can be continued.

This conclusion is not affected by any possible obligation of a railroad to perform transportation over a shipper's track so long as the track is fit for service. An industry is compelled to construct the track before a railroad is obliged to give service thereon, but if no such track is ever constructed the service obligation never comes into existence. In the same way, it is only reasonable to conclude that a service obligation which does not come into existence until a shipper constructs the track, ceases when the track is permitted to become unfit for service, for the giving of service is just as completely prevented by a track not fit for service as by lack of a track.

The duty of maintaining railroad track is one which normally results from ownership of such track. The fallacy of a contrary view is demonstrated by consideration of an individual rail placed by appellant in the track here involved as a result of the Commission's order. The rail is purchased by appellant with its own money. It belongs to appellant at all times subsequent to its purchase up to the moment when it becomes necessary to place it in the track. Since the Gas Company retains its right of ownership in the track, and since the rail becomes an integral part of the track, the act of placing it therein automatically transfers its ownership from appellant to the Gas Company. This cannot be the law. No argument based upon public necessity or the duty of a railroad to the public generally could justify such results.

The facts in the case at bar are a complete justification for this reasoning. All of the piece of track here involved is used in giving service to each of the appellee industries,

for the reason that each of the particular tracks serving each industry is nothing more than a continuation of the piece here in issue. But each of the appellee industries concedes and discharges its obligation to maintain the particular track into its plant. Thus, the Gas Company maintains that piece of track shown in yellow on Petitioner's Exhibit 1 (R. 58) lying west of the west side of Loomis Street. Moulding-Brownell and Heldmaier each maintain the tracks shown in white on Petitioner's Exhibit 1 and serving their respective plants. Yet these tracks are nothing more than extensions of the piece of track here involved. It is difficult to understand how an obligation to maintain parts of the entire track can be distinguished from an obligation to maintain all of the track required to supply the service which the appellee industries insist upon having.

It seems plain that the order of the Commission, in addition to being without authority in the common and statute law, imposes upon appellant an obligation which goes beyond appellant's agreement to serve the public. With the exception of the decision here involved, there is no law in Illinois or elsewhere which obligates a railroad to do more than construct and maintain track owned by it and on its right of way. The requirement of the order really has the effect of requiring appellant to extend its line, and this is a requirement which, under the facts in this case, is not justified by any view of the law.

In the first place, neither the order of the Commission nor the decision of the lower court undertake to confer upon appellant ownership of that extended line. The non-ownership of the line by appellant is to continue as a fact. Expenditures made by appellant upon the track will continue to be made for the benefit of the owner thereof and the other industries served thereby. Such a conclusion is contrary to every idea of justice and equity.

In the second place, the extension of line is not, as we shall show, for a public purpose, but for the private use and benefit of the appellee industries. The fact is that the area served by this track is not open to public development. The track itself is not capable of use by any interest other than the appellee industries. The compelled extension of appellant's line is not for public purposes, but for the benefit of private parties.

The general rule is that a railroad cannot be required to extend its line in order to serve individual shippers or even the public generally, when such extension is not within its original undertaking to serve the public. *I. C. C.* v. *Oregon etc. Co.*, 288 U. S. 14, 33, 39, 40; *A. T. & S. F. R. Co.* v. *Commission*, 160 Pac. (Cal.) 828, 831; *Hollywood* v. *Commission*, 219 Pac. (Cal.) 983, 985. In this case, the extension of line required by the Commission's order is certainly not within appellant's agreement. In some cases, railroads have been required to extend their lines by virtue of statutes or otherwise. *W. M. & P. R. Co.* v. *Jacobson*, 179 U. S. 287; *Union Lime Co.* v. *C. & N. W. R. Co.*, 233 U. S. 211, 222; *C. & N. W. R. Co.* v. *Ochs*, 249 U. S. 416, 420, 421; *L. E. & W. R. Co.* v. *Commission*, 249 U. S. 422, 425; *M. C. R. Co.* v. *Commission*, 236 U. S. 615; *S. A. L. R. Co.* v. *Commission*, 240 U. S 324. But in all such cases, the obligation was held to be within the original undertaking of the railroad. In no case has such a requirement been upheld in the absence of ownership of the extended line by the railroad, and of a public interest requiring the extension.

If the decision of the lower court is the law, a railroad is in constant danger of having its line automatically extended, so far as concerns the burdens of ownership, without its consent and in all directions. At the same time it will not own such extensions, will not have complete control over them, and in many cases, can be deprived of them

and of amounts spent on them, at the election of others. We submit that no theory of law or justice furnishes support for such conclusions.

It thus appears that there is no authority in law for the burden imposed upon appellant by the Commission's order. The only claimed authority therefor, as appears from the order and the decision of the lower court, consists of prior decisions of the lower court; and none of these decisions, when properly analyzed, constitute such authority. But even if they did support the conclusion reached by the lower court in the case at bar, they would add nothing to its validity. We submit that at least, there must be something in the statutes of Illinois or in the common law justifying the requirements of the order, if it is to be sustained. Since there is no such authority, it follows that there is no legal justification for the order and that it cannot be sustained.

2. In its order, the Commission said (R. 17) with reference to the track here involved:

> "It is therefore a part of the railroad now owned by the Alton and is a public highway open to public use. Its use is not limited to the industries which are now served by the industrial spur tracks which branch off therefrom, but any member of the public who can be served thereby is entitled to such service."

Following this discussion, the Commission found (R. 32):

> "That by reason of the matters hereinbefore set forth, the said spur track in question is a public track and part of the railroad facilities of the Alton Railroad Company."

Following this reasoning the Supreme Court of Illinois, discussing the argument presented to it by appellant, said with reference to that argument (R. 131):

> "It overlooks the fact that petitioning railroad uses this track for its own benefit to serve the industries

> located thereon, and, under the authorities above cited, may use the track, or extensions thereto, conveniently to serve other shippers and the public at large. The public, therefore, has an interest in the proper maintenance of this track quite apart from the interest of the parties to this suit."

It thus appears that the claimed public character of this track was an important ground for the conclusion reached both by the Commission and by the lower court. We submit that under the law and the facts, the track is not a public track and that this claimed justification for the decision of the lower court does not exist.

As we have said, the track here involved is wholly owned by the appellee industries except to the extent that it lies on appellant's right of way. The various spurs were constructed and are owned and maintained by the industries directly served thereby. The testimony was that the portion of the track shown in yellow on Petitioner's Exhibit 1 (R. 58), and lying off appellant's right of way was constructed and is owned by the Gas Company (R. 87). Except for the points at which the track crosses public streets and alleys, it lies on private property, almost all of which is owned by the appellee industries.

Under these circumstances, it is clear that the track is not a public track and open to indiscriminate use by the public at large in the same way as is a track owned by appellant and located upon its right of way. Section 45 of the Illinois Public Utility Act (See Appendix) provides that when a track has been constructed by a shipper and connected with a spur or connection constructed by a railroad, any corporation or person may use such track, but only subject to the conditions stated in the statute.

The law requires that any person desiring to use such track must pay a reasonable proportion of the cost thereof to the person paying for such track, such cost to be deter-

mined by the Commission. In addition, the right to such use is dependent upon whether the use will cause an unreasonable interference with the rights of the party incurring the original construction cost. It is thus plain that both the Commission and the lower court were wrong in concluding that in the case of the track here involved any person desiring to use it had that right. It is quite possible that many industries would desire to use this track and would be prevented from so doing by their inability to meet the conditions imposed by the statute.

No case cited in the opinion of the lower court supports the conclusion that the public now has any interest in the track here involved, or that it is impressed with a public character. In most of those cases, the tracks involved were to be constructed by the railroad on its property, at its expense, and were to be owned by it.

Certainly the appellee industries feel that they have a decided interest in this track by virtue of their ownership of it, and of the land upon which it lies. As appears from the report of the Commission (R. 22), the Edison Company claimed before the Commission that it should receive reasonable compensation for the use of its property occupied by the track. Presumably, such compensation should be paid by the owner of the track, since it is clear that under the law, the initial cost of constructing the track and of securing the land upon which it is placed was required to be paid by someone other than appellant.

There are numerous distinctions between the track here involved, and a track open to indiscriminate use by the public, such as a track owned by appellant and located upon its right of way. Thus, appellant could not impose, with respect to its owned track, the limitations imposed by statute upon the use of the track here involved by others than the appellee industries.

Appellant could not use this track for its general railroad purposes. It could not, for example, erect a freight house adjacent to it and use the track for the purpose of serving such a freight house. It could not use the track as a public delivery track through which any shipper or receiver could get service. But track which it owned would be available for all such uses.

Appellant has complete control over track owned by it, but only has such control over the track here involved as is required by its operation thereon and its maintenance thereof. That is to say, appellant has that control which is necessary to enable it to make the track safe and available for operation. But appellant's control stops at that point. Having no right of ownership in the track, it could not, for example, relocate it, even though proper railroading might dictate such a course.

The order of the Commission requires appellant to expend substantial amounts in maintaining the track, a part of which expenditures would, as found by the Commission (R. 31, 32), be chargeable to capital account under the rules of the Interstate Commerce Commission if appellant owned the track. But appellant cannot make the charge to that account under the circumstances, and is thus deprived of the right to earn any return upon amounts thus expended.

The owner of the track, which we must assume is the Gas Company (R. 87), presumably has the right to remove the track at any time it wishes. Even if it be thought that the other industries now served by the track have some rights in its continued operation, notwithstanding their lack of ownership, it would still seem such industries, by agreement, could provide for the removal of the track, and that appellant could make no valid objection thereto. In such case the salvage from the track could be sold by the owner and the proceeds retained, including amounts derived from

the sale of replacements made by appellant and some of the cost of which, if appellant owned the track, would have gone into its capital account.

Under Illinois law appellant has the right to condemn private property for its common carrier purposes (Ill. Rev. Stat. 1937, Ch. 114, Sec. 18), but it could not have condemned a right of way for the track here involved, even if it had wished to construct the track. In *Limits Industrial R. Co.* v. *American, etc. Works,* 321 Ill. 101, there was involved a petition for the condemnation of a right of way for a switch track to connect the line of an existing terminal railroad with a proposed industrial district. The proposed track would have been about 730 feet in length, and similar in every way to the track here involved. It would have been subjected to precisely the same character of use, and the industries to be served thereby were as numerous as the industries served by the track here involved. Dealing with the right of a railroad company to condemn for such a purpose, the Supreme Court of Illinois said at page 107:

> "Clearly, a railroad company cannot condemn private property for a spur track for the purpose of connecting a particular plant or industry, or a small group of such, with the main line of its road for the private benefit of the plant or industry and of the railroad company. Such a use would not be a public use of the property but a private use for the private profit of the plants or industries affected and of the railroad company."

Following this statement of the law the court then pointed out, in support of its conclusion, that the location of the proposed track would be such that it would not be available to the public generally. The same situation prevails in the case at bar. The track involved is elevated from its connection with appellant's line to the north side of Hillock Street (R. 76) and for this distance could not be used by

any industry. From there on, it lies entirely upon property owned by the appellee industries, except where it crosses two streets at grade; and is immediately north of Cologne Street, which certainly is not available for industrial development. (See Pet. Ex. 1, R. 58). Even the spurs serving the appellee industries could not be extended to serve others, as the property of the appellee industries occupies all of the space between Cologne Street and the Chicago River. If appellant could not have condemned right of way for this track, it is difficult to see how it qualifies as public track open to use by the public.

The fact is that this track is private, both in law and in fact. Legally, it might never be available for use by anyone other than the appellee industries, due to the inability of any other industry to meet the requirements of the statute, and the intervening rights of the owner. Actually, the physical situation is such that the track is not available to additional industries and cannot be made so available.

The distinction between public and private switch tracks, and the resulting differences in the obligations of the railroads with which they connect, has been recognized by this Court. In *Union Lime Co.* v. *C. & N. W. R. Co.*, 233 U. S. 211, this Court said at page 222:

> "There is a clear distinction between spurs which are owned and operated by a common carrier as a part of its system and under its public obligation and merely private sidings."

This statement was quoted with approval in *C. & N. W. R. Co.* v. *Ochs*, 249 U. S. 416, 420. The track here involved is not of the character involved in *Hairston* v. *D. & W. R. Co.*, 208 U. S. 598, where it appeared (p. 608) that the track to be constructed would not only serve one industry, but would be available as a general team track for the receipt and delivery of freight to all others.

It is not like the track involved in *Union Lime Co.* v. *C.*

& N. W. R. Co., 233 U. S. 211; *C. & N. W. R. Co.* v. *Ochs*, 249 U. S. 416; *L. E. & W. R. Co.* v. *Commission*, 249 U. S. 422, and *W. & A. R. Co.* v. *Commission*, 267 U. S. 493. In all those cases the track involved was owned or to be owned by the railroad, and was located or to be located on railroad right of way and actually open to use by the public generally. None of these things are true of the track involved in the case at bar.

The question thus presented is of substantial importance. A taking of property for private use cannot be justified even though there be compensation for such taking. In *Missouri Pacific Railroad Co.* v. *Nebraska*, 164 U. S. 403, this Court said at page 417:

> "The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States."

On this point see also *Hairston* v. *D. & W. R. Co.*, 208 U. S. 598, 605; *Great Northern Railroad Co.* v. *Cahill*, 253 U. S. 71, 77; *C. St. P., M. & O. R. Co.* v. *Holmberg*, 282 U. S. 162, 167; *Thompson* v. *Consolidated Gas Co.*, 300 U. S. 55, 80.

Also, the nature of the use to which this track is subjected is essentially a judicial question to be decided by this Court, even though the Commission and the lower courts have said the track is public. In *Hairston* v. *D. & W. R. Co.*, 208 U. S. 598, this Court, while recognizing that great respect should be accorded the judgments of state courts upon what should be deemed public uses in such states, nevertheless said at page 606:

> "The one and only principle in which all courts seem to agree is that the nature of the uses, whether public or private, is ultimately a judicial question."

To the same effect is *Rindge Co.* v. *Los Angeles*, 262 U.

S. 700, where this Court, while again recognizing the respect to be accorded the judgment of the courts of the state involved, nevertheless said at page 705:

> "The nature of a use, whether public or private, is ultimately a judicial question."

In *Cincinnati* v. *Vester*, 281 U. S. 439, this principle of law was again stated. This Court, at page 446, stated that the question of what is a public use is a judicial one, and adverting to the respect to be accorded the decision of local courts, again said,

> "But the question remains a judicial one which this Court must decide in performing its duty of enforcing the provisions of the Federal Constitution."

All of the circumstances which we have enumerated are inconsistent with any theory that the track is public and that the general public has any interest in it or in its maintenance. The law and the facts demonstrate that any amounts spent by appellant in maintaining the track will be expended for the private use and benefit of the appellee industries. The order of the Commission thus unquestionably takes the property of appellant for the private use of others, and is, therefore, a taking without due process of law, in violation of appellant's rights under the Fourteenth Amendment to the Federal Constitution.

3. So far as we know, there is no judicial decision dealing with the exact question here presented. It is natural to assume that this lack of direct ruling is due to the fact that it has never before been claimed that the public obligations of a railroad require it to maintain track not constructed or owned by it, not on its right of way, and devoted to a private use. There are, however, a number of decisions dealing with various phases of the situation now presented. All of those decisions compel the conclusion that the requirement of the Commission's order cannot be sustained.

In *Union Lime Co.* v. *C. & N. W. R. Co.*, 233 U. S. 211, the proceeding was one by the railroad company to condemn land for a spur track, the construction of which had been ordered by the Railroad Commission of Wisconsin under authority of a Wisconsin statute. The condemnation was resisted on the ground that the land was to be taken for a private and not a public use. This Court accepted the finding of the state court that the track, when constructed, would be a public track (pp. 220, 221), and upheld the right of the railroad to condemn, saying at page 222:

> "There is a clear distinction between spurs which are owned and operated by a common carrier as a part of its system and under its public obligation and merely private sidings."

In *C. & N. W. R. Co.* v. *Ochs*, 249 U. S. 416, the facts were that the Minnesota Railroad Commission had made an order requiring the railroad to alter and extend a side track already in existence and serving an industry, the order being made under authority of state statute which authorized the Commission to make a reasonable apportionment of the cost of the work. The track had been maintained and operated by the railroad for some years, which was free to use it for purposes other than serving the industry and had done so occasionally. This Court sustained the order, saying at page 419:

> "Under the settled rule in Minnesota a side track such as is in question here is not merely a private siding, but 'additional trackage for public use.' If need be, the right of way for it may be acquired by condemnation. It becomes the property of the railroad company and an integral part of its railroad system, and is wholly under its control. Besides enabling the public to get the products of the industry served, it is at the service of all who have occasion to use it, and must be operated accordingly."

Speaking of a carrier's duty to discharge obligations inherent in its business, this Court said at page 421:

> "To do this requires an expenditure of money, of course, but the expenditure is for property which will belong to the company and be employed in its business. The money is not taken from the company and given to others * * *."

This Court quoted with approval (p. 420) the statement made by it in the *Union Lime Company* case, *supra*, with respect to the distinction between spurs owned and operated by common carriers, and private sidings, and recognizing that the spur track was for a public and not a private use, approved the distribution of cost prescribed by the order.

In *L. E. & W. R. Co.* v. *Commission*, 249 U. S. 422, there was involved an order of the Public Utilities Commission of Illinois requiring the railroad company to restore a side track maintained and operated on its right of way for twenty-five years and which had been removed by it. In this case also, the public character of the track was apparent. This Court, considering some of the Illinois cases which we have cited herein, said at page 424:

> "Under the laws of the state the side track before its removal, although used principally in moving freight from and to Cameron's elevator and coal yard, was open to use by the public and subject to public control like other parts of the company's road; in other words, it was a track which the state impressed with a public character."

This conclusion was reached because of the fact that the track involved was actually part of the railroad, for it was to be constructed entirely upon the railroad right of way, and as stated by this Court at page 425:

> "When the track is restored the company will own it and be entitled to make a reasonable charge for its use, just as is the case with other property employed in the company's transportation service."

In *W. & A. R. Co.* v. *Commission*, 267 U. S. 493, there was involved an order of the Georgia Public Service Com-

mission requiring the railroad to furnish switching service on an industrial siding to an industry in Atlanta, Georgia. The track was entirely upon the railroad right of way, was presumably built and owned by the railroad and had been used for many years in the service of industries. Citing *Union Lime Co.* v. *C. & N. W. R. Co.*, 233 U. S. 211, this Court held (p. 496) that the spur track was for a public purpose, and sustained the order; overruling the contention that since the service on the spur was supplied at a loss to the railroad, there was a confiscation of its property (pp. 496, 497).

In *Jones* v. *Newport etc. Co.*, 65 Fed. 736 (6th Cir.), the case arose out of the discontinuance by the railroad of a side track which had been operated for many years for the purpose of serving the plaintiff. A specific allegation of the complaint was (p. 737) that by virtue of the long continued operation, the switch track became a part of the main line of the defendant's road. The Court of Appeals, through Judge Taft, later Chief Justice of this Court, rejected this claim, saying at page 740:

> "We must therefore dissent altogether from the proposition that the establishment and maintenance of a switch connection of the main line to a private warehouse for any length of time can create a duty of the railroad company at common law forever to maintain it. There is little or no authority to sustain it."

The court then referred to several cases decided by the Illinois courts, and referring to the decision in *C. & A. R. Co.* v. *Suffern*, 129 Ill. 274, said:

> "But this is very far from holding that there is any common law liability to maintain a side track forever after it has once been established."

The rule thus established was approved and followed in *Brown* v. *Southern R. Co.*, 187 Fed. 481, 485. In *Norfolk etc. Co.* v. *Norfolk etc. R. Co.*, 195 S. E. (Va.) 684, the action was to recover expenditures made by the plaintiff in

connection with certain tracks owned and operated by it. The Court said at page 687:

> "We have seen that this plaintiff has kept up its own tracks and its own yard and has done so at considerable expense to itself. This is as it should be. A man who shingles his own house must pay for it."

In *Aileen Mills* v. *Norfolk etc. R. Co.*, 140 S. E. (N. Car.) 306, the controversy was between the railroad and an industry as to which party should make certain necessary repairs on a side track serving the industry. The track was partly on the railroad right of way and partly on property of the industry. The opinion does not say who constructed it and owned it. The industry finally made the repairs and sued the railroad to recover the amount thus expended. After stating that the track involved was not constructed pursuant to an order of the Corporation Commission of North Carolina, as it might have been under the statute (p. 306), the Court said at page 307:

> "In the absence of a contract by which defendant was obligated to maintain said side track and trestle, or of an order of the Corporation Commission made under legislative authority, defendant cannot be held liable to plaintiff for the cost of making repairs, although necessary, upon the side track or trestle located on plaintiff's property, and used exclusively for plaintiff's benefit."

It will be observed that in the foregoing case, the question arose as to whether the track had been constructed by the railroad pursuant to an order of the Corporation Commission of North Carolina. Had the track been so constructed, it presumably would then have been owned by the railroad and constituted part of its facilities devoted to public use. The absence of such construction and ownership and devotion to public use was apparently the ground of the Court's decision.

In *Lehigh Valley R. Co.* v. *United Lead Co.*, 133 Atl. 290,

the suit was by the railroad to recover from the industry damages caused by the burning of cars while on side tracks serving the industry. The tracks were constructed under an agreement which protected the railroad company from damage arising from fire or other causes, and provided that the railroad should build the tracks and should own and maintain them during the life of the agreement. The Court denied the claim, finding that the agreement itself was illegal and that no recovery could be predicated thereon. Holding that the contract obligation of the railroad company to maintain the side tracks involved was one of the things making for the illegality of the entire contract, the Court said at page 292:

> "If the plaintiff is not obliged to reimburse the defendant for its expenditures in maintaining the sidings, which under the contract the plaintiff was obligated to maintain, then the defendant is not obligated to reimburse the plaintiff for the loss sustained by the burning of the cars."

It will be observed that each of the cases cited compel the conclusion that appellant cannot be required to expend its funds in the maintenance of the track here involved. In this case, we have none of the factors which were present in the cases in which obligations of railroads with respect to side tracks were sustained. In all those cases, the railroad ownership of the track involved; its status as part of the railroad; its public character; the complete railroad control of it, and the right of the railroad to condemn for the purpose of its construction, were the determining factors. None of these factors exist in the case at bar.

The question presented in this case more closely approximates that presented in *Missouri Pacific Ry. Co.* v. *Nebraska*, 217 U. S. 196. In that case, acting under a statute of Nebraska, a grain association applied in writing for an elevator siding on the right of way of the railway, which application was refused. The association then notified the

railroad that it intended to build an elevator near the end of an existing side track of the railroad and would expect an extension of the track. Although the railroad company refused to give the trackage privilege, the elevator was built and a suit was then brought to recover the penalty imposed by the state statute. This Court held that since the statute made no provision for compensation to the railroad for its outlay in building and maintaining the required side track (p. 205), it could not be sustained. This Court further said at page 207:

> "But if the statute is to be stretched, or rather shrunk, to such demands as ultimately may be held reasonable by the state court, still it requires too much. Why should the railroads pay for what, after all, are private connections? We see no reason."

The requirement of Illinois law that railroads are only required to build connections on their rights of way to connect with track built by shippers, is similar to the requirement of Section 1, Paragraph 9, of the Interstate Commerce Act (49 U. S. C. A. Sec. 1, Par. 9). With respect to this provision of the Federal Act, the Interstate Commerce Commission, in *Winters etc. Co.* v. *C. M. & St. P. Ry. Co.*, 16 I. C. C. 587, said at page 589:

> "By Section 1 of the amended act to regulate commerce the Commission is authorized to order the construction and maintenance, upon reasonable terms, of 'a switch connection' with any lateral branch line of railroad, or 'private side track *which may be constructed* to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same.' From the language of this section it is clear that the Commission has no authority to order the construction of a *private side track* by a railroad company, but that its authority is limited to ordering a carrier to make 'a switch connection' *with* a private side track. Certainly our authority does not embrace the power to order a carrier to construct and maintain a side track off

its right of way and without direct contribution by the shipper to the expense incident thereto."

The foregoing construction of the Federal Act was approved by this Court in *C. C. C. & St. L. R. Co.* v. *U. S.*, 275 U. S. 404, where the *Winters case, supra,* was cited by this Court with approval. The Commission has itself held in a case similar to the case at bar, that a railroad should not maintain track not owned by it and not on its property. In the Commission's Docket No. 15742, *In the Matter of the Petition of the C. C. C. & St. L. Ry. Co.*, 6 Illinois Com. Com. Rep. 967, the railroad had filed a petition complaining of the refusal of an industry to maintain the switch track serving it. The Commission found that the uniform practice in Illinois was for industries to maintain their own tracks; that a contrary ruling in the case before it would create a discrimination, and said:

"The Commission believes under all the facts and circumstances that the petitioner railway company should not be allowed to maintain the track in question under discriminatory circumstances as related to other industries not only on its own line but on the line of other railroads."

All of the foregoing decisions support the conclusion that appellant should not be required to maintain the track here involved, for the reasons that appellant did not construct and does not own the track; it is not constructed on appellant's property; it is not a public track; appellant does not have complete control over it, and had no legal right to condemn a right of way for it. This view of the requirement of the Commission's order is also supported by reason. As said by the Supreme Court of Virginia in *Norfolk etc. Co.* v. *Norfolk etc. R. Co.*, 195 S. E. 684, 687:

"A man who shingles his house must pay for it."

4. It will doubtless be argued that appellant receives large profits from the operation of the entire track here involved, and that this circumstance justifies the order of

the Commission. The fact, however, is not proven by the evidence. The testimony was that in 1934 appellant received approximately $40,000 in gross revenue from traffic moving over the track to and from the appellee industries. How much of this represents profit above costs of maintenance and operation is not shown and could not be shown (R. 80). But in any case, the point is unimportant.

Appellant is not necessarily seeking abandonment of service over the track, although its petition, as required by the Illinois statute, requests that relief. Without regard to whether the operation of this individual piece of track is or is not profitable, appellant is willing to continue that operation if it is relieved of the burden of maintaining the track and of making the payments required by the City of Chicago. For this reason its petition to the Commission was not founded upon the theory that the operation was unprofitable, although it may be so.

The record shows that most of the revenue received by appellant on traffic hauled over this track is switching revenue, appellant supplying a terminal facility for the benefits of other railroads who receive the line haul to Chicago (R. 93, 94). Nor does appellant receive any revenue which can be particularly assigned to this track. The rates to and from the appellee industries are the Chicago rates which apply to and from all industries in the Chicago switching district (R. 83, 84). These rates remain the same whether or not the appellee industries receive service over this track. The rates on traffic to and from these industries can be cancelled merely by eliminating the industries from the directory of industries (R. 84).

It is clear that the order of the Commission cannot be sustained on any theory of profit to appellant. It does not appear that there is any such profit. And any profit

which appellant may derive from operation over the track does not affect or relate to the determination of the questions presented for decision. Whether or not there is a return to appellant, it may not be deprived of its property for the benefit and use of private parties, and may not be required to enter into undertakings not within its agreement to serve the public.

In any case, the service which the appellee industries insist is so necessary to their continued existence will be available to them, even if appellant is relieved of the obligations imposed upon it by the Commission's order; always assuming, of course, that the service is of sufficient value to those industries to warrant them in making the expenditures which appellant is now required to make. The Gas Company announced its willingness to participate in the cost of maintaining the track, if it develops that appellant is not required to sustain that burden (R. 87). So far as the distribution of those expenditures is concerned, the Gas Company, which is presumably the owner of the piece of track here involved, is at liberty to make such voluntary arrangements as it wishes with the other appellee industries; and in the event of a disagreement the Commission has ample authority under the Illinois statute to deal with the matter (Ill. Rev. Stat. 1937, Ch. 111 2/3, Sec. 45, 49 (a)).

Conclusion.

The question presented for decision herein is of major importance. The continuing expense imposed upon appellant by the order involved is substantial. As appears from the Commission's decision in its Docket 15742, *Petition of C. C. C. & St. L. Ry. Co.*, 6 Ill. Com. Com. Rep. 967, the uniform practice of railroads in Illinois has been to require industries to maintain their own tracks. And so

far as appears from the decisions, this has been the practice elsewhere.

If the decision of the lower court is upheld, all this will be changed. A large additional expense will be cast upon railroads generally. They will be required to expend their funds in the improvement of property belonging to others. They will be required to assume burdens not incident to their engagement to serve the public, and which they have never before been required to assume.

We submit that this cannot be the law. Justice and equity require that the decision of the lower court be reversed, and that the Commission's order be set aside.

Respectfully submitted,

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Counsel for Appellant.

APPENDIX.

Section 45 of Chapter 111⅔, Illinois Revised Statutes, 1937.

"SEC. 45. Every railroad company, upon the application of any corporation or person, being a shipper or receiver or contemplated shipper or receiver of freight, or of any corporation, person or municipal corporation owning, operating or controlling any wharf or harbor facilities, for a connection between the railroad of such railroad company and any existing or contemplated track, tracks or railroad of such corporation, person or municipal corporation, shall make such connection and provide such switches and tracks as may be necessary for that purpose and deliver and receive cars thereover; *Provided,* that such connection is reasonably practicable and can be installed and used without materially increasing the hazard of the operation of the railroad with which such connection is sought, and that the business which may reasonably be expected to be received by such railroad company over such connection is sufficient to justify the expense of such connection to such railroad company.

Side Track Connections.

"Under the conditions specified in the above proviso every railroad company, upon the application of any corporation or person, being a shipper or receiver or contemplated shipper or receiver of freight, shall construct upon its right of way a spur or spurs for the purpose of receiving and delivering freight thereby, and shall receive and deliver freight thereby.

"Whenever the commission, after a hearing had upon its own motion or upon complaint, shall find that application has been made by any corporation or person to a railroad company for a connection or spur as provided in

this section, and that the railroad company has refused to provide such connection or spur, and that the applicant is entitled to have the same provided for him, the commission shall make an order requiring the providing of such connection or spur and the maintenance and use of the same upon reasonable terms which the commission shall have the power to prescribe. Whenever any such connection or spur has been so provided, any corporation or person shall be entitled to connect with the track, tracks or railroad thereby connected with the railroad of the railroad company, and to use the same or to use the spur so provided upon payment to the party or parties incurring the primary expenses of such track, tracks or railroad, or the connection therewith or of such spur, of a reasonable proportion of the cost thereof to be determined by the commission after notice to the interested parties and a hearing thereon: *Provided*, that such connection and use can be made without unreasonable interference with the rights of the party or parties incurring such primary expense. The commission shall likewise have the power to require one railroad company to switch to private spurs and industrial tracks upon its own railroad the cars of a connecting railroad company and to prescribe the terms and compensation for such service."

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938.

No. 231

THE ALTON RAILROAD COMPANY,
Appellant,

vs.

ILLINOIS COMMERCE COMMISSION, MOULDING-BROWNELL CORPORATION AND E. HELDMAIER, INC., ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

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Counsel for Commonwealth Edison Company.

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IN THE

SUPREME COURT OF ILLINOIS

No. 24531

THE ALTON RAILROAD COMPANY,
Appellant,

vs.

ILLINOIS COMMERCE COMMISSION EX REL., MOULDING-BROWNELL CORPORATION ET AL.,
Appellees.

STATEMENT BY APPELLEES OPPOSING JURISDICTION OF SUPREME COURT OF THE UNITED STATES.

Now come Illinois Commerce Commission, Moulding-Brownell Corporation, E. Heldmaier, Inc., a corporation, Commonwealth Edison Company, a corporation, and The Peoples Gas Light and Coke Company, a corporation, appellees herein, and present this statement disclosing matters or grounds making against the jurisdiction of the Supreme Court of the United States asserted by the appellant.

I.

Statement of Facts.

Appellant, by its petition to the Illinois Commerce Commission (R. 232), sought an order of the Commission determining that the industries served by a certain switch track (referred to by the Commission in its order as a

"spur track") in the City of Chicago should pay all future costs of maintaining it and all license and other fees assessed under ordinance for its occupancy of public streets and alleys; and that in default of such payments appellant be authorized to discontinue the rendering of service over the track (R. 239). After a hearing, the Commission entered an order (R. 6) denying appellant authority to abandon the track and denying it authority to discontinue the rendering of railroad transportation service by means thereof; also specifically ordering appellant to continue the maintenance and operation of the track and the rendering of railroad transportation service by means thereof (R. 30).

That order was affirmed by the Circuit Court of Cook County, Illinois (R. 758), and the judgment of the Circuit Court was affirmed by the Supreme Court of Illinois.

As stated in the opinion of the Supreme Court of Illinois, the findings of fact made by the Illinois Commerce Commission in its order have not been disputed by any of the parties.

The Illinois Commerce Commission found, in substance, that for many years the petitioner has been rendering rail service to various industries by operation over the spur track in question; that a portion of said track was originally constructed about 1866 or 1868, at grade, upon property belonging to others than appellant, and crossed various public streets and alleys; that since then various extensions of said track have been constructed in accordance with contracts under which all or most of the cost of such extensions has been paid and borne by one or another of the industries served by said track (R. 10); that pursuant to a track elevation ordinance passed by the City Council of the City of Chicago in 1903, a portion of said track was elevated and the cost of elevation was paid by The Peoples Gas Light and Coke Company, one of the industries served by means of the track, and by Commonwealth Electric Company, the

owner of a part of the lands on which the track was laid; that from 1904 up to the present time, appellant and its predecessors in interest have maintained, renewed, replaced and repaired the track, although since 1923 appellant and its predecessors in interest have endeavored to induce the industries served by means of the track to pay the cost of its maintenance, renewal, replacement and repair, and the license fees charged by the City of Chicago for the privilege of maintaining the track across streets and alleys (R. 11-12).

The track in question is a spur track or lead track, which is, and at least since 1885 has been, connected with the main track of the railroad now owned by appellant (R. 25), and it extends thence across five streets and certain alleys in the City of Chicago (R. 25), a distance of 2831 feet (R. 29), being more than one-half of a mile.

The industries now being served over the spur track are Moulding-Brownell Corporation, E. Heldmaier, Inc., and The Peoples Gas Light and Coke Company which furnishes gas to the City of Chicago and its inhabitants. Each of those industries is furnished railroad transportation service by means of industrial spur tracks, which branch off the spur track in question, except that a gas manufacturing plant of the Gas Company is furnished railroad transportation service by means of an extension of said spur track. The industrial spur tracks which branch off from the lead spur track in question and the extension which furnishes service to the gas manufacturing plant are not in controversy in this case, as the cost and expense of their maintenance, repair and renewal have always been borne by the industries served thereby (R. 28).

The spur track in question was constructed by or at the cost and expense of owners of land on which the track is laid, and not at the cost or expense of appellant or any of its predecessors in interest, and, except at its connection with the main track of appellant's railroad and for a dis-

tance of 150 feet therefrom, the spur track was constructed, and is now located, on lands not owned by appellant (R. 25).

In 1904 a portion of said spur track was elevated, in compliance with an ordinance of the City of Chicago, and The Peoples Gas Light and Coke Company and the Commonwealth Electric Company paid the cost of elevation (R. 26).

Appellant has other spur tracks (known as lead tracks) in Illinois of the same length of the spur track in question, with spurs leading off therefrom and serving industries, but the lead track in each instance, which serves the same purpose as the spur track in question, is on appellant's property and appellant owns and maintains those lead tracks (R. 29).

Appellant did not contend before the Commission that public convenience and necessity no longer requires the operation of the spur track, nor did it contend that the operation over the track has resulted or will result in any loss to it. On the contrary, the evidence showed that the track is indispensable to the operation of the plants of the Gas Company and the plants of the Moulding-Brownell Corporation and E. Heldmaier, Inc., and that the traffic handled over the track in 1934 by appellant amounted to about $40,000.00 (R. 17-18). It appears that the average "running repair" on the track has cost about $1,000.00 per year, although the total outlay will be greater than that sum during the next few years, due to necessary replacements (Opinion of Illinois Supreme Court).

The Commission found that under the law of Illinois, as established by numerous decisions of the Supreme Court of Illinois, a railroad switch track, side track or spur track constructed in whole or in part on or across public streets or highways and connected with the main line of a railroad becomes a part of that railroad, and therefore a public highway in the sense that term is used in the Constitution of Illinois, whether constructed by the Company owning or

operating such main line of railroad or by the owner of an industry served by such switch track, side track or spur track or at the joint expense of the railroad company and such owner; that its use is not limited to the industries which are now served by the industrial spur tracks which branch off therefrom, but any member of the public who can be served thereby is entitled to such service; and that it would therefore seem most inequitable and unjust to require the industries served by the existing industrial spur tracks to pay the cost of maintaining and keeping in repair the lead spur track in question (R. 18-19).

In brief, the sole contention of appellant before the Commission and in the State courts has been that it is not required to maintain the track in question because it does not own the track or the land on which the track is laid, even though it has the exclusive use of the track, pays no rental therefor, charges the owners the same rates charged other members of the public for railroad transportation over the track, and sustains no financial loss by reason of its operation over the track after paying the cost of maintenance and repairs. Its position is that it is entitled to all the benefits but cannot be required to assume the burdens attendant upon the use of the track in furnishing railroad transportation service to the public, and that an order requiring it to assume those burdens deprives it of its property without due process of law.

Appellant's claim that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment of the Supreme Court of Illinois rests upon its mere statement, made in the State Courts, but unsupported by any cases or argument, that the order of the Illinois Commerce Commission constitutes a taking of appellant's property without due process of law.

Appellees contend that appellant's claim is so frivolous and devoid of merit, and so contrary to the established law

as settled by the decisions of the Supreme Court of the United States, that it is not reviewable by the Supreme Court of the United States.

II.

If appellant had the right, under the Fourteenth Amendment, to abandon service over the track in question unless the industries served thereby paid the cost of its maintenance and repair (which is the real basis for its appeal to the Supreme Court of the United States), it was not necessary for it to obtain authority from the Illinois Commerce Commission to abandon the track. However, it considered such authority necessary and voluntarily petitioned the Commission for authority to abandon service over the track. By its petition, it necessarily recognized the power and jurisdiction of the Commission either to grant or refuse the prayer of its petition. The order of the Commission requiring it to maintain the track was a necessary consequence of the refusal of the Commission to authorize appellant to abandon service over the track unless the industries paid the cost of maintenance and repair. Having voluntarily submitted itself to the jurisdiction of the Illinois Commerce Commission on the question of authority to abandon service over the track, appellant is estopped to deny the power of the Commission to enter an order in the exercise of the very jurisdiction which appellant invoked.

McDonald v. *Oregon Navigation Company*, 233 U. S. 665 (670).

Appellant therefore has no right to change its position at this time and prosecute an appeal to the Supreme Court of the United States on the ground that the order of the Illinois Commerce Commission deprives it of property without due process of law, in violation of the Fourteenth Amendment.

III.

Under the law of Illinois, a switch track, side track or spur track constructed on or across public streets or highways and connected with the main line of a railroad, is a part of such railroad and is subjected to use for the public.

St. Louis, Springfield and Peoria Railroad v. *Commerce Commission*, 309 Ill. 621.

The previous decisions of the Supreme Court of Illinois are reviewed in the case above cited, and in the subsequent case of *von Oven* v. *Chicago, Burlington and Quincy Railroad Company*, 317 Ill. 334, the court said (pp. 342-3):

> "This court has held that switch-tracks built for industrial connections with railroads, whether built at the expense of the railroad or the owners of the industry, or at the joint expense of both, become, in legal contemplation, tracks of the railroad with which they are connected, open to public use and subject to public regulations."

The Supreme Court of the United States in *Lake Erie & Western Railroad Company* v. *State Public Utilities Commission*, 249 U. S. 422 at 424, followed the decisions of the Supreme Court of Illinois establishing the law of Illinois as above set forth.

The spur track in question is, therefore, under Illinois law, a part of appellant's railroad, open to public use, and subject to public regulations. The contention that an order of the Illinois Commerce Commission requiring appellant to operate and maintain such a track deprives appellant of property without due process of law is so frivolous and devoid of merit that the Supreme Court of the United States should not entertain an appeal from a judgment of the Supreme Court of Illinois affirming such order.

IV.

Appellant, having the possession and exclusive use of the track in question, is under the legal obligation to maintain the track and keep it in repair.

Gridley v. *City of Bloomington*, 68 Ill. 47 (51);
City of Peoria v. *Simpson*, 110 Ill. 244 (299-300);
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51 Corpus Juris, p. 760;
Williamson v. *Phillipoff*, 66 Fla. 549, 64 So. 269;
German-American Bank of Seattle v. *Normile*, 82 Wash. 368, 144 Pac. 289;
Bennett v. *O'Brien*, 37 Ill. 250.

The claim, that an order requiring one to perform an obligation imposed upon him by the common law deprives him of property without due process of law in violation of the Fourteenth Amendment, is so frivolous and devoid of merit that the Supreme Court of the United States should not entertain an appeal from a judgment affirming such order.

V.

The question attempted to be presented by appellant's appeal is foreclosed by previous decisions of the Supreme Court of the United States, as follows:

Union Lime Company v. *Chicago and Northwestern Railway Company*, 233 U. S. 211;
Lake Erie & Western Railroad Company v. *State Public Utilities Commission of Illinois*, 249 U. S. 422;
Chicago & Northwestern Railway Company v. *Ochs*, 249 U. S. 416;
Western & Atlantic v. *Public Service Commission*, 267 U. S. 493, 496.

VI.

The cases cited in Paragraph 6 of appellant's statement in support of jurisdiction, with the exception of *Lake Erie & Western Railroad Co.* v. *State Public Utilities Commission, supra,* involve either the validity of provisions of state statutes fixing penalties for failure to comply with the decisions and orders of state regulatory bodies or the question of whether the rates fixed by the state regulatory bodies under the evidence in the respective cases were so unreasonable as to amount to confiscation of the property of the complaining parties. No such issues are involved in this cause.

VII.

The foregoing shows that any question under the Fourteenth Amendment is foreclosed by previous decisions of the Supreme Court of the United States, and is so unsubstantial and frivolous as to justify the motion to affirm, if not the motion to dismiss, filed herewith.

Respectfully submitted,

ILLINOIS COMMERCE COMMISSION,
By OTTO KERNER,
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HARRY R. BOOTH,
Assistant Attorney General of Illinois.
THE PEOPLES GAS LIGHT AND COKE COMPANY,
By COOKE, SULLIVAN & RICKS,
Its Attorneys.
MOULDING-BROWNELL CORPORATION,
By CLARENCE B. CARDY, *Its Attorney.*
E. HELDMAIER, INC.,
By CLARENCE B. CARDY, *Its Attorney.*
COMMONWEALTH EDISON COMPANY,
By ISHAM, LINCOLN & BEALE,
Its Attorneys.

IN THE

SUPREME COURT OF ILLINOIS

No. 24531

THE ALTON RAILROAD COMPANY,
Appellant,

vs.

ILLINOIS COMMERCE COMMISSION EX REL., MOULDING-BROWNELL CORPORATION ET AL.,
Appellees.

MOTION TO DISMISS APPEAL OR AFFIRM DECISION OF THE SUPREME COURT OF THE STATE OF ILLINOIS.

Now come Illinois Commerce Commission, Moulding-Brownell Corporation, E. Heldmaier, Inc., a corporation; Commonwealth Edison Company, a corporation, and The Peoples Gas Light and Coke Company, a corporation, appellees herein, and move to dismiss the appeal herein on the ground that the case presents no substantial Federal question; and they further move, if the motion to dismiss is not granted, that this Court affirm the decision of the Supreme Court of the State of Illinois on the ground that the questions on which the decision of this cause depends are so unsubstantial as to need no further argument, all as appears in

the statement of grounds making against the jurisdiction of this Court filed herewith.

ILLINOIS COMMERCE COMMISSION,
By OTTO KERNER,
Attorney General of Illinois;
HARRY R. BOOTH,
Assistant Attorney General of Illinois.
THE PEOPLES GAS LIGHT AND COKE COMPANY,
By COOKE, SULLIVAN & RICKS,
Its Attorneys.
MOULDING-BROWNELL CORPORATION,
By CLARENCE B. CARDY,
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E. HELDMAIER, INC.,
By CLARENCE B. CARDY,
Its Attorney.
COMMONWEALTH EDISON COMPANY,
By ISHAM, LINCOLN & BEALE,
Its Attorneys.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1938.

No. 231

THE ALTON RAILROAD COMPANY,
Appellant,

vs.

ILLINOIS COMMERCE COMMISSION, ex rel.,
MOULDING-BROWNELL CORPORATION, et al.,
Appellees.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1938.

No. 231

THE ALTON RAILROAD COMPANY,
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vs.

ILLINOIS COMMERCE COMMISSION, ex rel.,
MOULDING-BROWNELL CORPORATION, et al.,
Appellees.

BRIEF FOR APPELLEES

MAY IT PLEASE THE COURT:

Having succeeded in bringing this case to the attention of this Court by appeal from the Supreme Court of Illinois on the assertion that a substantial federal question is involved, the appellant has filed a 60-page brief and argument principally challenging the correctness of the decision of the Supreme Court of Illinois on non-federal grounds—in particular that the Supreme Court of Illinois has misconstrued certain statutes of the State of Illinois, has misstated the common law, and has misapplied both the common and statutory law of Illinois in reaching its decision in this case.

Statement of the Case.

Under the laws of Illinois, the Illinois Commerce Commission is required to make and render findings concerning the subject matter and facts inquired into and enter its order based thereon. (Ill. Rev. Stat. 1937, ch. 111-2/3, sec. 69; Appendix, p. 33.) In compliance therewith, in this case the Commission made findings of fact which appear on pages 24 to 33, both inclusive, of the printed transcript of record. The correctness of those findings of fact has never been challenged by the appellant. We, therefore, refer the Court to those findings of fact instead of burdening this brief with a repetition thereof.

However, the following short summary of the essential facts and of the proceedings before the Illinois Commerce Commission may aid the Court in passing upon the issues before it.

Sometime prior to 1884—more than fifty years ago—the track in question was constructed by or at the cost and expense of owners of lands on which the track is laid, and was connected with the main track of the railroad now owned by appellant. (R. 25.) As originally constructed it crossed five streets at grade. (R. 25.) In 1903 the City Council of the City of Chicago passed an ordinance requiring one of appellant's predecessors to elevate that portion of the track which crossed three of those streets, whereby a grade separation between the streets and the track would be provided. (R. 25-26.) The ordinance was for a term of twenty years and imposed a charge of $300 per annum for the privilege of maintaining the track across streets. (R. 26.) The cost and expense of elevation was borne by The Peoples Gas Light and Coke Company, one of the industries served over the track, and

the Commonwealth Electric Company, one of the owners of land on which the track was laid, pursuant to a contract, dated November 1, 1904, between those companies and one of appellant's predecessors. (R. 26-27.) By that contract, the Gas Company and the Electric Company agreed to pay the entire cost of elevating the track and assumed the payment to the City of the annual compensation of $300 imposed by the ordinance, and the railway company agreed to maintain, renew, replace and repair the track during a period of five years and so long thereafter as the railway company should be permitted to use and operate the track for the purpose of handling freight business of the Gas Company and the Electric Company and of such other industries as may be located upon any lot or lots abutting upon the track, to the exclusion of all other railroad companies. (R. 26-27.)

During the life of that ordinance the Gas Company reimbursed the railway company for the annual payments made by the railway company to the City of Chicago as compensation for crossing public streets. (R. 27.)

Upon the expiration of the 1903 ordinance, the City Council of the City of Chicago, on December 10, 1924, passed a new ordinance purporting to grant permission to the railway company to maintain and use the spur track, as then constructed, over and across the five streets hereinabove mentioned for a period of twenty years, and imposing an annual charge of $1,400 for the supposed privilege of crossing those streets and alleys. (R. 27-28.) Later, by ordinance passed in 1934, the annual charge was reduced to $700 per annum. (R. 28.)

The Gas Company refused to pay the annual charge of $1,400 imposed by the 1924 ordinance, (R. 9-10), on the obvious ground that it should not be required to pay that charge when the railroad was using the track to serve

other industries which had contributed nothing either towards the elevation or maintenance of the track during the preceding twenty years.

Appellant acquired the railroad system which it now operates on July 18, 1931 (R. 29). Thereafter it threatened to abandon service over the track, and because thereof Moulding-Brownell Corporation and E. Heldmaier, two of the industries served by the track, filed a complaint with the Illinois Commerce Commission praying for an order requiring appellant to continue service over the track. (R. 36-38.) After hearings upon that complaint but before any order had been entered by the Commission thereon, appellant filed a petition with the Illinois Commerce Commission praying that an order be entered by the Commission determining that the industries located on and served by the track should pay all future costs of maintaining the track and all license and other fees assessed under ordinance or otherwise because of the occupancy of public streets and alleys, and that in default of such payments by said industries, appellant be authorized to discontinue the rendering of service to said industries over the track. (R. 52-55.)

Ever since the track in question was constructed, both before and after elevation of a portion thereof, it has been connected with the main track of the railroad now owned by appellant, and during all of that period appellant and its predecessors have furnished railroad transportation service over the track to industries adjacent to the track and in the vicinity thereof, (R. 25), and have paid all cost of maintenance except the charge exacted by the City of Chicago as compensation for crossing public streets during the period from 1903 to 1923, and $900 thereafter. (R. 29.)

None of the industries now served over the track in

question receives direct service from the track itself, but such direct service is furnished by means of industrial tracks, paid for and maintained by the respective industries, which branch off from or are an extension of the track in question, and those industries have no other means of railroad transportation available. (R. 30.)

The length of the track in question is 2831 feet—more than one-half of a mile. (R. 31.)

The Commission found that the track in question is a public track and part of the railroad facilities of appellant, (R. 32), and that public convenience and necessity requires that appellant continue the maintenance and operation of the track. (R. 33.)

The Order of the Illinois Commerce Commission.

In its order, the Illinois Commerce Commission stated that the track in question crosses several streets and alleys and, is, and has been for more than thirty years, connected with the main track of the railroad now owned by appellant, and that it is therefore a part of the railroad now owned by appellant and is a public highway open to public use; that its use is not limited to the industries which are now served by the industrial spur tracks which branch off therefrom, but any member of the public who can be served thereby is entitled to such service; and that it would therefore seem most inequitable and unjust to require the industries served by the industrial spur tracks to pay the cost of maintaining and keeping in repair the track in question or to pay any license fees exacted by the City of Chicago on account of the track in question crossing public streets and highways. (R. 17.) The order entered by the Commission denied authority to abandon the spur track in question and denied authority to discontinue the rendering of rail-

road transportation by means thereof, and specifically ordered appellant to continue the maintenance and operation of the track and the rendering of railroad transportation service by means thereof to the industries now served thereby and to such other industries and to all of the public who may now or hereafter be reasonably entitled to such transportation service over the track. (R. 33-34.) As hereinafter shown, for the purposes of this appeal the effect of that order is the same as though the provisions thereof were contained in a statute of the State of Illinois.

The Decision of the Supreme Court of Illinois.

In brief, the decision of the Supreme Court of Illinois, sustaining the validity of the order of the Illinois Commerce Commission, (368 Ill. 584, R. 129-132) is to the effect (1) that, under the law of Illinois, a switch-track built for industrial purposes and across public thoroughfares becomes a part of the main line of the railroad system which it joins and is subject to governmental regulation in the public interest even though it was built by private funds and for the most part on private property; (2) that appellant's argument that the duty of maintenance is an incident of ownership and that since it was under no duty to build the track in the first place and does not now own it, the burden of maintenance cannot be imposed upon it, is incompatible with the repeated holdings of the Supreme Court of Illinois that switch-tracks of this type, once built, become a part of the main line of the railroad, whether built upon private rights-of-way or upon public streets; (3) that such argument overlooks the fact that appellant uses this track for its own benefit to serve the industries located thereon, and, under Illinois law, may use the track, or extensions

thereto, conveniently to serve other shippers and the public at large, and that the public has an interest in the proper maintenance of the track quite apart from the interest of the parties to this suit; (4) that Section 50 of the Public Utilities Act of Illinois authorizes the Illinois Commerce Commission, by order, to direct any public utility to make such additions, extensions, repairs, improvements or changes that the Commission shall find ought reasonably to be made to promote the security or convenience of the public or to secure adequate service or facilities, and that this section is broad enough to impose a duty upon a railroad to maintain property which it uses for its own profit as well as that to which it has title (Appendix, p. 32); (5) that under the facts shown, the order of the Commission will result in no discrimination; and (6) that the order of the Commission was within its statutory power and does not violate any provision of the State or Federal Constitutions. (R. 129-132.)

SUMMARY OF ARGUMENT.

I.

The only federal question presented by appellant, whether a railroad which is required by a statute of a state (here an order of the Illinois Commerce Commission) to operate and maintain a public switch track which is part of that Company's railroad system and operated as such for more than 50 years is thereby deprived of its property without due process of law, is not substantial enough to warrant review by this Court. It also appears that the appellant did not argue this question in its brief before the Supreme Court of Illinois other than to assign it as error. Furthermore, its brief filed with this Court is primarily devoted to contentions that questions of state law were erroneously decided by the Supreme Court of Illinois.

II.

The track in question is property devoted to public use. The Supreme Court of Illinois has held that a switch track, built for industrial purposes and across public thoroughfares by private funds, becomes a part of the main line of the railroad system adjoining and is subject to governmental regulation in the public interest. Such a track is not a private one, but a public highway under Article II, Section 12 of the Constitution of Il nois, providing that railways in Illinois are public highways.

The construction of a state statute and a state constitution adopted by the highest court of the state is not open to review here. This Court has held that under the laws of Illinois a side track open to public use is impressed with a public character and is therefore subject to public control. In the *Union Lime* case, 233 U. S. 211, a statute requiring railroads to construct and maintain a spur track was sustained and a decision of the Wisconsin Commission requiring the extension of a side track was upheld against a contention that the spur was private in character. This Court also held that the railroad was under a duty to maintain it. The track in that case, as here, was constructed at the expense of the shipper.

III.

Under the laws of Illinois the appellant is obligated to maintain, keep in repair and operate the track in question.

This Court must accept as final the decision of the Supreme Court that the order of the Illinois Commerce Commission is authorized by the laws of Illinois. It can consider only the question of whether the order, authorized by Illinois law, is so arbitrary and unreasonable as to deprive appellant of its property without due process of law.

IV.

A railroad, obligated by a state statute or a Commission order to operate and maintain a switch track, is not thereby deprived of its property without due process of law, for the obligation of a utility to render service and maintain adequate facilities is well recognized. It cannot refuse to render service to the public because it has

repudiated a contract purporting to define its liability with respect to the maintenance of this track.

Even if the appellant had shown that the expense of maintaining the property constitutes an excessive burden, it could not discontinue operations without the consent of the Commission. This Court has held that losses and large expenditures in connection with individual operations do not by themselves justify discontinuance of switching or side track operations.

The evidence shows that appellant has received approximately $40,000 in gross revenue in 1934 from the operations which it sought to discontinue. Never was it contended that public convenience does not require continuation of operations on this track or that future operations would result in any loss. There is no suggestion that the required maintenance would result in excessive or arbitrary expenditures.

The decision of the Commission has not been shown to be arbitrary or unreasonable. The construction of the track and its subsequent elevation resulted in no cost to the appellant and its predecessors have never paid any rental for the track. The only expense borne by the appellant and its predecessors has been the cost of maintenance and repair, an obligation which it may reasonably be required to assume.

Appellant receives the benefit from the operations of the facilities in question and it cannot claim that its property is being taken without due process because of the minor expense to which it is put by the Commission's order requiring that it maintain and repair the track.

ARGUMENT.

I.

Appellees' motion to dismiss appeal or affirm the judgment of the Supreme Court of Illinois.

The jurisdiction of this Court was invoked by appellant under that provision of Section 237 of the Judicial Code (28 U. S. C. A. Sec. 344), which provides for a review by this Court of a final judgment in the highest court of a state where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution of the United States and the decision is in favor of its validity.

The statute, the validity of which is attacked by appellant in this case, is necessarily the order of the Illinois Commerce Commission which the Supreme Court of Illinois has held valid, as that order must be treated as though an Act of the legislature of the State of Illinois. *Lake Erie and Western Railroad Co.* v. *State Public Utilities Commission*, 249, U. S. 422, 424.

On July 14, 1938, appellees filed with the clerk of the Illinois Supreme Court their motion to dismiss this appeal or to affirm the decision of the Supreme Court of Illinois, on the ground that there is no substantial federal question in this case, which motion was, by order of this Court, reserved until the hearing on the merits.

The brief and argument since filed by appellant shows that the motion to dismiss or to affirm should be sustained. It now clearly appears from appellant's own brief that the alleged federal question which appellant

claimed it desired to submit to this Court is so unsubstantial and frivolous that it does not warrant consideration by this Court.

Briefly stated, the only federal question presented by appellant is, whether a railroad company which is required by a statute of a state to operate, maintain and keep in repair a public switch-track, which is part of that company's railroad system and which has been operated as a part of such system for more than fifty years, is deprived of its property without due process of law by reason of such requirement to operate, maintain and keep such track in repair. The mere statement of the question should furnish the answer without any argument being necessary.

On page 23 of its brief appellant cites *Milheim* v. *Moffat Tunnel District*, 262 U. S. 710, 716, 717, in support of the statement that if the federal question is one which requires analysis and exposition for its decision, it cannot be said to be frivolous. When the instant case was presented by appellant to the Supreme Court of Illinois, appellant apparently considered any constitutional question in the case as so remote or devoid of merit that it neither made any analysis or exposition of any such question by argument nor cited any authorities in its brief bearing upon the question. Appellant has caused a certified copy of the brief filed by it in the Supreme Court of Illinois to be filed with the Clerk of this Court, and that brief shows that the only reference therein made by appellant to any constitutional question was the mere assertion, in the nature of an assignment of error, that the order of the Illinois Commerce Commission constituted a taking of appellant's property without due process of law, in violation of its rights under the State constitution and under the Fourteenth Amendment to the Constitution of the United

States (p. 17), followed later by the bare statement that the order of the Commission violates appellant's constitutional rights in that it imposes upon appellant the burdens of ownership while recognizing that there is no basis in fact for such imposition (p. 50).

The same, in effect, is true of the brief filed by appellant in this Court. If the authorities cited by appellant, and the arguments made, in support of its contention that questions of state law were decided erroneously by the Supreme Court of Illinois are eliminated, nothing remains in appellant's brief having any application to this case except the mere assertion that the order of the Illinois Commerce Commission deprives appellant of its property without due process of law, because it requires appellant to expend money in maintaining and keeping in repair a track it did not originally construct and which is located on land not owned by appellant. Such assertion wholly ignores the controlling facts that under the settled law of Illinois the track is a public track, dedicated to public use, and is and has been for more than fifty years a part of the railroad system now operated by appellant; also, that the maintenance and repair of the track, including the replacement of ties, rails and other track facilities are rendered necessary by the exclusive use of the track by appellant and its predecessors in furnishing railroad transportation service to its patrons as members of the public.

II.

The track in question is a part of appellant's railroad system and is open for the use of the public.

In its decision in this case, the Supreme Court of Illinois repeated what it had theretofore, in substance, said in several cases, that a switch-track built for industrial

purposes and across public thoroughfares becomes a part of the main line of the railroad system which it joins and is subject to governmental regulation in the public interest even though it was built by private funds and for the most part on private property. (R. 131.) It further said that, under the law of Illinois, appellant may use the track in question, or extensions thereto, conveniently to serve other shippers, in addition to the industries located thereon, and the public at large. (R. 131.)

Whether switch-tracks or spur-tracks are of a public or private nature necessarily depends upon the laws of the state in which such tracks are located, as construed by the court of last resort of the state.

Section 12 of Article XI of the Constitution of Illinois (Appendix, p. 31) provides that railways in Illinois are public highways and shall be free to all persons for the transportation of their persons and property thereon under such regulations as may be prescribed by law. By reason of that constitutional provision, the Supreme Court of Illinois has consistently held that a switch-track, side track or spur track constructed on or across public streets or highways and connected with the main line of a railroad becomes a part of such railroad, whether constructed by the railroad company or by the owner of an industry served by such track or at the joint expense of the railroad company and such owner, and is a public highway within the meaning of the constitutional provision. *Truesdale* v. *Peoria Grape Sugar Co.*, 101 Ill. 561, 567; *Chicago Dock and Canal Company* v. *Garrity*, 115 Ill. 155, 167; *People* v. *Blocki*, 203 Ill. 363, 369; *Public Utilities Commission* v. *Smith*, 298 Ill. 151, 157; *Van Oven* v. *Chicago, Burlington and Quincy Railroad Co.*, 317 Ill. 334, 342-344.

It is, therefore, futile for appellant to argue in this court (Appellant's Brief, pp. 40-43), that the track in question which answers every requirement of the rule established by the decisions of the Supreme Court of Illinois under Section 12 of Article XI of the Constitution of Illinois defining a public switch-track, is not a public track but is a private track.

In *Swiss Oil Corporation* v. *Shanks*, 273 U. S. 407, 411-412, this Court said that the construction of a state court upon the statutes and constitution of its own state cannot be reviewed by this Court.

In numerous cases this Court has held that it is without authority to review and revise the construction affixed to a state statute as to a state matter by the court of last resort of the state. *Quong Ham Wah Co.* v. *Industrial Commission*, 255 U. S. 445, 448; *Price* v. *Illinois*, 238 U. S. 446, 451; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61.

In *Enterprise Irrig. Dist.* v. *Canal Co.*, 243 U. S. 157, 166, this Court said that the decision of the state courts upon questions of state law are controlling and not open to review.

Directly in point is the case of *Lake Erie & Western Railroad Company* v. *State Public Utilities Commission of Illinois*, 249 U. S. 422, 424, where, in considering the nature of a side track in Illinois, this Court said that under the laws of Illinois the side track, although used principally in moving freight from and to one industry, was open to use by the public and subject to public control like other parts of the company's road; that, in other words, it was a track which the state impressed with a public character.

A complete answer to appellant's whole argument in this case has been furnished by this Court in *Union*

Lime Company v. *Chicago and Northwestern Railway Company*, 233 U. S. 211. In that case the validity of a statute of Wisconsin was involved, which required every railroad to acquire the necessary right-of-way and to construct, connect, maintain and operate a reasonably adequate and suitable spur track not exceeding three miles in length whenever practically indispensable to the successful operation of any industry or enterprise and not unusually unsafe or unreasonably harmful. The railroad had the right, under the statute, to require the person primarily to be served thereby to pay the legitimate cost of acquiring, by condemnation or purchase, the necessary right-of-way for the spur and of its construction, as determined by the Railroad Commission. The statute authorized the Commission to receive complaints, in case of the failure or refusal of railroads to perform the prescribed duty, and to make appropriate orders. Acting upon that statute, the Commission directed the railway company to extend a spur to a certain industry. The same argument was made in that case as is made by appellant in this case—that the spur was not for public use. This Court said that the statute must be read in the light of the construction placed upon it by the Supreme Court of Wisconsin, which held the use to be a public one (p. 221) and quoted the following from the decision of that court (p. 220-221):

> "'Such track when built becomes a portion of the trackage of the railroad. The fact that its initial cost is borne by the party primarily to be served with provisions for subsequent equitable division of such cost, does not make it a private track nor change the nature of its use. Over it the products of the industry find their way into the markets of the world, and every consumer is directly interested in the lessened cost of such products resulting from the building and operation thereof. That these products are supplied by a single owner, or by a limited

> number of owners, affects the extent and not the nature of its use—the track is none the less a part of the avenue through which the commodities reach the public. Subject to the equitable division of the initial cost, the track is at the service of the public as much as any other, and it constitutes an integral part of the railroad system. *The duty to maintain and operate it rests upon the railroad.* (Italics ours.) Except that it is relieved of the initial cost of right of way and construction, the track stands in the same relation to it that any other portion of its track does. The owner of the industry obtains no interest in or control over it beyond that of being served by it equally with any one else who may desire to use it.'"

On pages 45-46 of its brief appellant refers to that case, in connection with others, and says that in all those cases the track was owned or to be owned by the railroad, and was located or to be located on railroad right-of-way. That statement is no more true of the spur track involved in the *Union Lime Company* case than it is true in this case. There the owner of the industry primarily to be served was required to pay the entire cost and expense of acquiring the right-of-way and of constructing the spur track. (Note 1, pp. 217-218.) In what way the railroad thereby became the owner of the right-of-way and track, the entire cost of which had been paid by the owner of the industry, is not explained by appellant. Apparently the spur track involved in that case was in exactly the same condition as to ownership as the spur track in this case; it was constructed by or at the expense of a certain industry and was dedicated for public use, and as stated in the *Union Lime Company* case, "the duty to maintain and operate it rests upon the railroad."

III.

Under the laws of Illinois, appellant is obligated to maintain, keep in repair and operate the track in question.

Appellant's argument is replete with assertions that there is no statute or law in Illinois which requires it to maintain and keep in repair the track in question (Appellant's Brief, pp. 28-32; 34; 37-38). Those assertions are too numerous and lengthy to quote in full, but the following are fairly representative.

On page 28 of its brief appellant says that there is no provision of any Illinois statute relating to the maintenance of switch-track constructed by a shipper off a railroad's right-of-way and owned by that shipper; that there is no statutory authority for the requirement of the Commission that appellant maintain the track here involved; and that there has never been a common law obligation upon a railroad company to *construct* such a track. Those statements are followed by quotations from cases purporting to show what the common law is with reference to the obligation of a railroad company to *construct* a track, (Appellant's Brief, pp. 28-29), notwithstanding the fact that there is no question of any obligation on the part of appellant to construct a track involved in this case. Then follows a reference to the Illinois statutes and to a provision of the Constitution of Illinois relating to railroad companies receiving and transporting grain in bulk, which cannot have any application to this case because there are no elevators or public warehouses served by means of the track in question.

On page 30 of its brief, appellant quotes a section of the Illinois statutes and tells this Court what construction appellant places on that statute.

On page 32 of its brief, appellant says that the only inference to be drawn from the common law and the constitutional and statutory provisions relating to such track is that the owner or the industries served thereby must maintain the track in such condition that service can be given; and that the Supreme Court of Illinois was wrong when, in its decision in this case, it held otherwise.

On page 34 of its brief, with reference to Section 50 of the Illinois Public Utilities Act (Ill. Rev. Stat. 1937, ch. 111-2/3, sec. 50), appellant says that the Supreme Court of Illinois misconstrued and misapplied that statute in its decision in this case.

Appellant also contends, and attempts to support its contention with several pages of argument and citation of authorities (Appellant's Brief, pp. 34-39), that it cannot be required to maintain the track in question because that is not within its original undertaking to serve the public. A sufficient answer to that contention should be, that it comes with poor grace from appellant, after more than fifty years exclusive use of this track by it and its predecessors as a part of the railroad system now owned by appellant, to say at this late day that the operation and maintenance of the track by appellant is not within the railroad's original undertaking to serve the public.

Manifestly this Court is not concerned with any such questions upon this appeal.

In *American Railway Express* v. *Kentucky*, 273 U. S. 269, 272-273, this Court said that the due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this Court to revise the decisions of the state courts upon questions of state law.

In *Detroit & Mackinac Railway* v. *Paper Co.*, 248 U. S.

30, this Court said that it cannot consider questions of local law; that upon the construction of the state laws the state court has the last word.

In *Arkansas Southern Railroad* v. *German Bank*, 207 U. S. 270, 275, this Court said that if the state Supreme Court rested its judgment upon principles of common law as it understood them, this Court has no jurisdiction even though it believes the State Court was wrong.

In *Waters-Pierce Oil Co.* v. *Texas* (No. 1) 212 U. S. 86, 97, this Court said that its jurisdiction to review the proceedings of the state courts is not that of a general reviewing court in error, but is limited to the specific instances of denials of Federal rights, whether those pertaining to the constitutionality of Federal or state statutes, or to certain rights, immunities and privileges of Federal origin, specially set up in the state court and denied by the rulings and judgment of that court.

If this court considers this case as presenting any substantial Federal question, it must accept the decision of the Supreme Court as final that the order of the Illinois Commerce Commission is authorized by the laws of Illinois, and consider only the question whether that order deprives appellant of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. The obligation of appellant to comply with that order, in so far as the laws of Illinois are concerned, has been settled by the Supreme Court of Illinois.

IV.

The order of the Commission does not violate the Fourteenth Amendment to the Constitution of the United States.

When the smoke screen raised by appellant to confuse the issue before this Court has been brushed aside, the simple question remains, whether a railroad company which is required by a statute of a state (an order of the Illinois Commerce Commission) to operate, maintain and keep in repair a public switch track, which is a part of that company's railroad system and which has been operated as a part of such system for more than fifty years, is deprived of its property without due process of law by reason of such requirement to operate, maintain and keep such track in repair.

Obviously the Illinois Commerce Commission has the right, without violating the Federal Constitution, to require appellant to continue the operation of the track in question. It necessarily follows that appellant must maintain it in such condition that it can be operated safely. It owes that duty to the public. If, under state law or under contract, as between appellant and any private party or parties, the obligation to maintain and keep in repair that track is imposed upon such private party or parties, appellant can obtain reimbursement for its expenditures by suit in the state courts. It cannot however, refuse to perform its duties to the public, by any contention that, as between it and a certain private party or parties, the cost and expense of performing such duties is, under state law or under contract, imposed on the private party or parties. The question before this Court is, therefore, further narrowed to a determination of the question whether, as between appellant

and the public, the requirement that appellant continue the operation of the track deprives appellant of its property without due process of law.

In this connection it may be of interest to the Court that Section 49a of the Public Utilities Act of Illinois (Ill. Rev. Stat. 1937, ch. 111 2/3, Sec. 49a) provides that "no public utility shall abandon or discontinue any service without first having secured the approval of the Commission". (Appendix, p. 31.) Obviously, it was on account of that provision that appellant deemed it necessary to apply to the Commission for permission to abandon service over the track in question, and injected into the case the question whether it or the industries now primarily served over the track should pay the cost of maintenance and repair. But, as we have said, that is a question of state law and is a question for the state courts.

Fort Smith Light and Traction Company v. *Bourland*, 267 U. S. 330, involved the right of the Traction Company to abandon a part of a street railway line without leave of the City Commission, when under the state law it was not permitted to abandon any part of its line without leave of the City Commission. The Traction Company, in applying to the City Commission for such leave, claimed that the part sought to be abandoned was unremunerative. It appeared that on account of a change of grade in the street, the Traction Company would be required to expend $11,000 in relaying tracks in order to continue the operation of that part of the line which it sought to abandon, while the daily earnings allocated to that part of the system were only $2.40, and the cost of operating it was $8.25 per day. The request to abandon was denied by the City Commission. Suit was brought in the state court to set aside the order of the

City Commission on the ground that it deprived the Traction Company of its property without due process of law. The highest court of the state denied relief, and this Court said (p. 332):

> "The Greenwood Avenue line had been in operation nearly twenty years. No change in conditions had supervened which required the commission to permit the abandonment, unless it were the fact that this particular part of the system was being operated at a loss; that continued operation would involve practical rebuilding of that part of the line; that such rebuilding would entail a large expenditure; and that the system as a whole was not earning a fair return upon the value of the property used and useful in the business. The order complained of does not deal with rates. Nor does it involve the question of the reasonableness of service over a particular line. * * * It merely requires continued operation. We cannot say that it is inherently arbitrary. A public utility cannot, because of loss, escape obligations voluntarily assumed. *Milwaukee Electric Ry. Co.* v. *Milwaukee*, 252 U. S. 100, 105. The fact that the company must make a large expenditure in relaying its tracks does not render the order void. Nor does the expected deficit from operation affect its validity. A railway may be compelled to continue the service of a branch or part of a line, although the operation involves a loss."

In *Western & Atlantic Railroad* v. *Georgia Public Service Commission*, 267 U. S. 493, the railroad company sought to enjoin the enforcement of an order of the Georgia Public Service Commission requiring the railroad to furnish switching service on an industrial siding to an industry. The railroad company had notified the industry that unless it signed the railroad company's standard form of sidetrack agreement, service over the track would be discontinued. In its bill, the railroad company alleged that the track was out of repair, that it

would have to expend $440 to put the track in proper repair, and that enforcement of the order would deprive the railroad company of its property without due process of law. This Court said (pp. 496-497):

> "It is said that the requirement of the continuance of the service deprived the Company of its property without due process of law, in violation of the Fourteenth Amendment, because the service rendered by the sidetrack was much greater in out-of-pocket cost than the compensation. This can not be sustained. The service has been rendered for years. It was a voluntary arrangement, and under its statutory powers (Sec. 2664, Georgia Code, 1910) was made irrevocable by the Public Service Commission under Rule 14, except by consent of the Commission. The spur track was for a public purpose. *Union Lime Co.* v. *C. & N. W. Ry. Co.*, 233 U. S. 211. The requirement that such a service should not be discontinued without notice and hearing was clearly within the police power of the State. • • • Even if the cost of the switching is more than what is received for it, we can not determine on any showing made by the Company that the switching does not work a benefit in the increased business that the Company gets, or may get, by reason of the added facilities furnished by the switching. The switch is a small part of the whole railway, and the mere fact that the switching may not be profitable by itself can not be held to be a confiscation of property, even if it involves a loss."

In *Atlantic Coast Line Railroad Company* v. *North Carolina Corporation Commission*, 206 U. S. 1, this Court said (pp. 19-20):

> "The elementary proposition that railroads from the public nature of the business by them carried on and the interest which the public have in their operation are subject, as to their state business, to state regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end, is not

and could not be successfully questioned in view of the long line of authorities sustaining that doctrine. Accepting this general rule, the assignments of error rest upon the hypothesis that the order which the court below enforced was so arbitrary and unreasonable in its character as to transcend the limits of regulation and to be in effect a denial of due process of law or a deprivation of the equal protection of the laws."

In the case now before this Court, appellant concedes, (Appellant's Brief, p. 56), and the evidence shows, that in 1934 appellant received approximately $40,000 in gross revenue from traffic moving over the track in question, but says that fact is unimportant. It necessarily makes that statement because it has never contended that the track has ever been operated at a loss, but its sole contention is that no matter how profitable the operation of the track may be to appellant, it cannot be required to maintain the track and keep it in repair because it does not own the track. In other words, appellant's position is, and has always been, that it is entitled to all the benefits from the track but does not want to be burdened with any of the costs attendant upon the maintenance of the track. Such a position is most inequitable and unjust, as found by the Commission. (R. 17.)

In its final analysis the question before this Court, therefore, is whether the order of the Commission is so arbitrary and unreasonable in its character as to transcend the limits of regulation and to be in effect a denial of due process of law.

That a state can compel a railroad company to continue the operation of a track when public convenience and necessity requires such operation, has been settled by the decisions of this Court as hereinbefore shown. In this case the evidence shows and the Commission

found that public convenience and necessity requires the operation of the track in question, as there are three industries (one being a public utility furnishing gas to the City of Chicago and its inhabitants) which have no other means of railroad transportation service. As to this the Commission said (R. 15-16):

> "The Alton does not contend that public convenience and necessity no longer require the operation of the track, nor does it contend that the operation over the track has resulted or will result in any loss to it. On the contrary, the evidence shows that the track is indispensable to the operation of the plants of the Gas Company and the plants of the Moulding-Brownell Corporation and E. Heldmaier, Inc., and that the traffic handled over the track in 1934 by the Alton amounted to about $40,000 according to the testimony of the Alton's own witness."

Thus it appears that there is no question of excessive expenditures involved in this case.

That the order of the Commission is not arbitrary or unreasonable in requiring appellant to continue the maintenance and operation of the track appears from what we have hereinabove said and is shown by the evidence offered by appellant itself before the Commission. The order can, furthermore, be tested by all the criteria set forth in the case of *Chicago & N. W. Ry. Co.* v. *Ochs*, 249 U. S. 416, and not be found wanting. In that case this court said (p. 421):

> "Of course, the expense is an important element to be considered in determining whether the requirement is within the bounds of reasonable regulation or is essentially arbitrary, but it is not the only one. The nature and volume of the business to be affected, the revenue to be derived from it, the character of the facility required, the need for it and the advantage to be realized by shippers and the public are also to be considered. Tested by these criteria

we think the order in question is not arbitrary, but reasonable."

The track in the instant case is one over which appellant and its predecessors have served several industries for more than fifty years and over which appellant is, by the laws of Illinois, required to serve any member of the public requiring service by means thereof. It cost appellant and its predecessors nothing for construction, and nothing for track elevation required by a city ordinance. Appellant and its predecessors have paid no rental for the track. For more than twenty years appellant's predecessors were reimbursed by the Gas Company for the amounts which they were required by ordinance to pay as compensation to the City of Chicago for crossing public streets and alleys. That expense, as well as the entire cost of elevation, was borne by the Gas Company under a contract made in 1904, which was before the existence of any Commission in Illinois authorized by law to compel appellant's predecessors to furnish railroad transportation service over the track. The only expense borne by appellant and its predecessors for the track, of which they have had the exclusive use ever since it was constructed, has been the cost of maintenance and repair occasioned by their use of the track, and the license fee required by the 1924 ordinance. The replacement of ties, rails and other track facilities, of which appellant complains because it cannot charge the cost thereof to its capital account, is rendered necessary by appellant's free use of a track which it says does not belong to it. At some time in the past those ties and rails were new and were paid for by some one other than appellant or its predecessors. Is it inequitable or unjust to require appellant to replace such ties and rails in a track, which it says belongs to the Gas Company, which it has worn out in serving the public?

On page 37 of its brief, appellant says that the duty of maintaining railroad track is one which normally results from ownership of such track. On page 38 it says that expenditures made by it upon the track will continue to be made for the benefit of the owner thereof and the other industries served thereby, and that such a conclusion is contrary to every idea of justice and equity.

Apparently appellant has a most distorted conception of equity and justice. In its petition to the Illinois Commerce Commission it prayed for an order determining that the industries located on and served by the track should pay all future costs of maintenance. It based its petition on the ground that as it does not own the track it cannot be required to maintain it. It evolved the theory, which is contrary to the common law (*Gridley* v. *City of Bloomington*, 68 Ill. 47, 51; *Sunasack* v. *Morey*, 196 Ill. 569, 571; 51 C. J. 760; *Williamson* v. *Phillipoff*, 66 Fla. 549, 60 So. 269, 271; *German-American Bank of Seattle* v. *Normile*, 82 Wash. 368, 144 Pac. 289, 290), that the obligation to maintain and repair a track is irrevocably imposed by law upon the owner and cannot be imposed by law upon another without violating the Fourteenth Amendment to the Constitution of the United States. Realizing that on such theory an industry or industries which did not own the track likewise could not constitutionally be required by law to pay any of the cost of maintenance and repair, although entitled by law to receive railroad transportation service over the track because it is a public highway, appellant was forced to take the position that as the Gas Company is the owner of the track, it is because of such ownership, required and on appellant's theory is the only one who can be constitutionally required, by law to pay the cost of main-

tenance and repair. Appellant's statement that the Gas Company is the owner of the track in question is based upon the testimony of John T. Craven, Chief Operating Engineer of the Gas Company who testified that the Gas Company owns the track, on the theory that the Gas Company paid for the construction of the track (R. 87), evidently meaning that the Gas Company paid the cost of elevation of the track. However, for the purposes of this argument, it may be assumed that the Gas Company does own the track, based upon the fact that it paid all the cost of the construction thereof and paid all of the license fees imposed by the City of Chicago on account of the track crossing public streets and alleys during the period from 1903 to 1923.

The Gas Company is also a public utility and manufactures and supplies gas to the City of Chicago and its inhabitants. It paid a large part, if not all, of the cost of elevating the track in 1904. It receives no rental or other compensation from appellant for the use of the track, but on the contrary pays appellant the same rates for railroad transportation service as are paid by other industries for such services over the track. Yet, appellant's conception of equity and justice is, that the Gas Company—not appellant—should pay the cost of maintaining and repairing this public track in order that the public may continue to receive the railroad transportation service to which it is entitled over this track.

It is therefore apparent that the order of the Illinois Commerce Commission is neither arbitrary nor unreasonable, but is in accordance with accepted principles of law, and that an order imposing upon one industry, or upon all of the industries now served by appellant over the track in question, the obligation to maintain the track would be improper, inequitable and unjust.

CONCLUSION.

This Court should dismiss the appeal due to the absence of a substantial federal question or in the alternative affirm the order of the Supreme Court of Illinois sustaining the order of the Commission denying the railroad permission to discontinue service over the side track. The Commission's order constitutes a reasonable exercise of the police power of the State of Illinois. Requiring the railroad to maintain a switch track devoted to public service does not result in taking its property without due process of law.

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APPENDIX.

Section 12 of Article 11 of the Constitution of the State of Illinois.

§ 12. Railways heretofore constructed, or that may hereafter be constructed in this state, are hereby declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law. And the general assembly shall, from time to time, pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads in this state.

Section 49a of Chapter 111 2/3, Illinois Revised Statutes, 1937.

§ 49a. No public utility shall abandon or discontinue any service without first having secured the approval of the Commission. In granting its approval, the Commission may impose such terms, conditions or requirements as in its judgment are necessary to protect the public interest. Provided, however, that any public utility abandoning or discontinuing service in pursuance of authority granted by the Commission shall be deemed to have waived any and all objections to the terms, conditions or requirements imposed by the Commission in that regard. Provided further, that nothing in this section shall be construed to limit the right of a public utility to discontinue service to individual patrons in accordance with the effective rules, regulations, and practices of such public utility.

Section 50 of Chapter 111 2/3, Illinois Revised Statutes, 1937.

§50. Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public utility or of any two or more public utilities ought reasonably to be made or that a new structure or structures should be erected, to promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities, the Commission shall make and serve an order directing that such additions, extensions, repairs, improvements or changes be made, or such structure or structures be erected in the manner and within the time specified in said order. If any additions, extensions, repairs, improvements or changes, or any new structure or structures which the Commission has ordered to be erected, require joint action by two or more public utilities, the Commission shall notify the said public utilities that such additions, extensions, repairs, improvements or changes or new structure or structures have been ordered and that the same shall be made at the joint cost whereupon the said public utilities shall have such reasonable time as the Commission may grant within which to agree upon the apportionment or division of cost of such additions, extensions, repairs, improvements or changes or new structure or structures, which each shall bear. If at the expiration of such time such public utilities shall fail to file with the Commission a statement that an agreement has been made for a division or apportionment of the cost or expense of such additions, extensions, repairs, improvements or changes, or new structure or structures, the Com-

mission shall have authority, after further hearing, to make an order fixing the proportion of such cost or expense to be borne by each public utility and the manner in which the same shall be paid or secured.

Section 69 of Chapter 111 2/3, Illinois Revised Statutes, 1937.

§69. At the time fixed for any hearing upon a complaint, the complainant and the person or corporation complained of, and such persons or corporations as the Commission may allow to intervene, shall be entitled to be heard and to introduce evidence. The Commission shall issue process to enforce the attendance of all necessary witnesses. At the conclusion of such hearing the Commission shall make and render findings concerning the subject-matter and facts inquired into and enter its order based thereon. * * *

SUPREME COURT OF THE UNITED STATES.

No. 231.—October Term, 1938.

The Alton Railroad Company, Appellant, vs. Illinois Commerce Commission, Moulding-Brownell Corporation, and E. Heldmaier, Inc., et al.	Appeal from the Supreme Court of the State of Illinois.

[January 16, 1939.]

Mr. Justice Butler delivered the opinion of the Court.

The question is whether an order made by the commission, denying appellant's application for authority to discontinue, and requiring it to continue, maintenance and operation of a switch track in Chicago used to serve shippers, deprives it of its property in violation of the due process clause of the Fourteenth Amendment. Specifically, appellant maintains that by compelling it to expend its funds for the upkeep of a track not constructed or owned by it and upon land it does not own, the order is repugnant to that provision of the Constitution. The Illinois supreme court, affirming the circuit court of Cook County, sustained the order as a valid exercise of state power. 368 Ill. 584.

Appellees, insisting that our decisions rule that question in their favor, filed a motion to dismiss or affirm.* We postponed consideration of the motion to the argument of the case on the merits. Now after hearing counsel it appears that the question presented by the appeal is not so clearly lacking in merit that upon mere citation of our decisions it may be put aside as not requiring further consideration. We therefore deny the motion. *Milheim* v. *Moffat Tunnel Dist.*, 262 U. S. 710, 716, 717. *Hamilton* v. *Regents*, 293 U. S. 245, 258.

Through purchasers at judicial sale July 18, 1931, appellant acquired the properties of the Chicago & Alton Railroad Company, a

*Appellees rest their motion to dismiss or affirm on: Union Lime Co. v. Chicago & N. W. Ry. Co., 233 U. S. 211. Lake Erie & W. R. R. Co. v. Pub. Util. Comm., 249 U. S. 422. Chicago & N. W. Ry. Co. v. Ochs, 249 U. S. 416. Western & Atlantic v. Public Comm., 267 U. S. 493, 496.

consolidated company formed in 1906 and in receivership from 1922 to the sale. It and its predecessors, including the receiver, may for brevity be referred to as the carrier.

The switch track in question extends from the carrier's main line about 150 feet on the right-of-way, thence 2,681 feet, crossing public streets and alleys, to the boundary of the plant of the Peoples Gas Light & Coke Company upon land largely, if not wholly, owned by that company and the other industries served by the track. The industries, commencing with the one nearest the main line, are Commonwealth Edison Company, E. Heldmaier, Inc., Moulding-Brownell Corp., and the gas company. All but the first depend upon the track for rail transportation. It has been extended for some distance into the plant of the gas company. Five spurs, that appropriately may be called private sidings, extend from it and serve within the plants of the industries. There is here no question as to the part of the track within the gas plant or of the spurs serving the industries. Construction was begun prior to 1884, and at least since 1887 the stretch here in question has been used to serve the gas company, and for more than 30 years other industries between that company's plant and the main line. The original cost of construction was borne by the gas company and possibly other industries. It does not appear by whom the cost of maintenance prior to 1904 was paid.

Pursuant to ordinance passed November 2, 1903, a part of the track was elevated at crossings of three streets and two intervening alleys. November 1, 1904, the carrier made an agreement with the gas company and the predecessor of the electric company pursuant to which they paid the cost of elevation. The gas company agreed to pay an annual fee of $300 imposed by the ordinance for the privilege of maintaining the track across the streets and alleys. The carrier agreed to maintain the track. And, by an assignment reciting that the ordinance had been obtained for their benefit, the carrier transferred it to the gas and electric companies. The gas company paid the fees until the 1903 ordinance expired November 2, 1923. Then it and the electric company insisted that future exactions by the city as well as maintenance should be borne by the carrier. The latter refused to accept the additional burden. December 10, 1924, the city passed an ordinance authorizing use of the streets for 20 years from expiration of the 1903 ordinance, increased the annual fee to $1,400, and required a bond to insure

compliance. The carrier accepted the terms of the ordinance, having an understanding with the gas and electric companies that they would pay the charges. Nevertheless, it paid $1,400 annually from 1923 to 1932 and was reimbursed only to the extent of $300 paid by the gas company for each of three years in that period. As of November 2, 1932 the annual fee was reduced to $700, and appellant paid it up to November 2, 1936. The carrier bore the cost of maintaining the track from 1904 to March 26, 1936. On that date, exercising as it asserts a right reserved by final decree in the receivership proceeding, it elected not to assume the contract. Nevertheless, it has continued to use and maintain the track. Thus since 1903 the carrier, in addition to maintaining the track, has paid $15,190 to the city as compensation for its occupancy of the public streets and alleys. Through error as it says, it paid taxes on the track for some of the time.

Needed repairs and betterments of the track involved will require expenditures amounting to about $4,000 a year for three years; then annual cost of maintenance will be about $1,000. It may be assumed that, in order to continue operation, appellant will have to pay whatever fees are charged by the city, and that, because the track is on land not owned by it, its expenditures for additions and betterments must, as it asserts, by accounting regulations be charged to operating expenses. The annual gross revenue for transportation over the track amounts to about $40,000.

Appellant does not suggest that operating expenses including the city charges, plus cost of replacements and betterments, will exceed revenue derived from use of the track or that operation of the track will not yield it a reasonable profit; nor does it claim, as of constitutional right, to be entitled to have any profit from use of the switch track separately considered. *Puget Sound Traction Co.* v. *Reynolds*, 244 U. S. 575, 580. *Fort Smith Traction Co.* v. *Bourland*, 267 U. S. 330, 332. *Western & Atlantic* v. *Public Comm.*, 267 U. S. 493, 496-497. Admittedly, appellant is willing to continue to use the track to serve the industries. Its petition prays an order requiring them to pay cost of maintenance and future city charges. It seeks authority to discontinue service and to cancel applicable rates, but only in case of failure of the industries to pay these operating expenses. It wants, not to give up the traffic, but to shift a substantial financial burden that it has long been bearing to the industries served.

The state supreme court held: As between the public and the railroad, a switch track built for industrial purposes and across public thoroughfares becomes a part of the main line of the system which it joins and is subject to governmental regulation in the public interest, even though it was built by private funds and for the most part on private property; appellant uses the switch track in question for its own benefit to serve industries located on it and may use it and extensions of it to serve other shippers and the public at large; the public has an interest quite apart from that of the parties to the suit in the maintenance of the track; the state public utility act, § 50, is broad enough to impose upon a railroad duty to maintain the property which it uses for its own benefit as well as that to which it has title; the commission has ample power to enforce that duty and the order does not violate any provision of the state or federal constitutions.

We have held: The uses for which a track was desired are not the less public because the motive which dictated it . . . ocation was to reach a private industry, or because the proprietors of that industry contributed to the cost. *Hairston* v. *Danville & Western Railway*, 202 U. S. 598, 608. The State, consistently with the due process clause of the Fourteenth Amendment, may empower a common carrier by railroad to condemn a right-of-way for a spur leading to a single industry to be operated under obligations of public service open to all and devoted to public use. *Union Lime Co.* v. *Chicago & N. W. Ry. Co.*, 233 U. S. 211, 222. It may compel a railroad to extend a siding to an adjacent industry so as to provide additional trackage for public use and, if necessary, to condemn a right-of-way. *Chicago & N. W. Ry. Co.* v. *Ochs*, 249 U. S. 416, 419. For similar exertions of state power, see *Lake Erie & W. R. R. Co.* v. *Pub. Util. Comm.*, 249 U. S. 422, 424 and *Western & Atlantic* v. *Public Com.m., supra.*

The decision of the state supreme court in this case must here be held conclusively to establish that under the constitution and laws of Illinois the order is valid. The decisions of this Court above cited leave no doubt as to the power of the State to require a common carrier by railroad to condemn rights-of-way for and to construct switch tracks like the one here involved. So far as concerns decision of this case, it matters not whether Illinois has exerted that power, for the track has been laid and is being used by the carrier. The required maintenance and operation are not be-

yond the scope of the carrier's undertaking to serve the public. *Union Lime Co.* v. *Chicago & N. W. Ry. Co., supra. Chicago & N. W. Ry. Co.* v. *Ochs, supra.*

Assuming that the questions whether the switch track is open to public use and has become a part of the main line are so related to the constitutional issue here presented that the state court's determination of them is not binding upon this Court, we are of opinion that, upon the facts alleged in appellant's petition to the commission, the latter's unchallenged findings, and our decisions in similar cases, it is clear that in point of fact and law the switch track and any extensions of it that may be made are open to use to serve the public and constitute a part of the carrier's system.

Asserting that the duty to maintain a track such as that in question normally results from ownership, appellant earnestly insists that the order is shown to be unreasonable by the fact that rails and other materials purchased and owned by it when put into the track immediately cease to belong to it and become the property of the gas company which, appellant says, retains right of ownership in the track. But, in making that and similar arguments, appellant ignores the decisions in this case of the commission, the state supreme court, and as well the ruling of this Court just indicated, to the effect that the track in question is one built for industrial purposes on and across public thoroughfares; a track that has become a part of the main line of the carrier's system and, though constructed without cost to it on lands owned by others, is open to public use; a track which has long been and is being used by the carrier for its own benefit and by it may be used, with extensions if any shall be made, to serve the public at large.

Appellant does not suggest that as against the owners of the land or those who paid for building the track, it is a trespasser or without right to continue to maintain and operate the track as required by the order. Nor does it say that, by exertion of the power of eminent domain, it may not successfully resist demands of claimants or owners for possession of any part of the land or of the track not owned by it. See *Mapes* v. *Vandalia R. R. Co.*, 238 Ill. 142, 145; *Black* v. *C., B. & Q. R. R.*, 243 Ill. 534, 539; *Roberts* v. *Northern Pacific Railroad*, 158 U. S. 1, 11; *Northern Pacific Railroad Co.* v. *Smith*, 171 U. S. 260, 271.

If, as suggested, expenditures for needed betterments, as well as those for maintenance, are chargeable to operating expenses, all are returnable to the carrier, out of operating revenue, as a part of the cost of maintenance and use. And, if appellant acquires title to the land and track, then additions and betterments made by it will constitute a part of its investment in road and equipment owned and used for its purposes as a common carrier and, by the due process clauses of the state and federal constitutions, safeguarded against confiscation.

It is clear that enforcement of the order will not take appellant's property in violation of the due process clause of the Fourteenth Amendment.

Affirmed.

Mr. Justice BLACK is of opinion that the motion to dismiss should be granted.

Mr. Justice ROBERTS took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.